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FEDERAL COMMUNICATIONS COMMISSION

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Federal Communications Commission Record

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-123

In re Applications of

EDA GORDON (hereafter "Gordon") — File No. BPH-870514MB

SOUTHWEST EDUCATIONAL MEDIA FOUNDATION OF TEXAS, INC (hereafter "Southwest") — File No. BPED-870515MA

ENCHANTED BROADCASTING, INC. (hereafter "Enchanted") — File No. BPH-870515MD

RADIO PROPERTY VENTURES (hereafter "Ventures") — File No. BPH-870515MM

BERNALILLO COMMUNICATIONS, INC. (hereafter "Bernalillo") — File No. BPH-870515MY

RADIO NEW MEXICO (hereafter "Radio") — File No. BPH-870515NA

NEW MEXICO/ CAPITOL COMMUNICATIONS, LTD. (hereafter "Capitol") — File No. BPH-870515NR

ALBU-Q BROADCASTING, LTD. (hereafter "Broadcasting") — File No. BPH-870515NT

BRADLEY BROADCASTING LTD. (hereafter "Bradley") — File No. BPH-870515NW

ALBUQUERQUE BROADCAST LIMITED PARTNERSHIP (hereafter "Limited") — File No. BPH-870515NZ

For Construction Permit
for a New FM Station
on Channel 267A in
Albuquerque, New Mexico

HEARING DESIGNATION ORDER

Adopted: May 19, 1989; Released: June 5, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Southwest.* A review of the applicant's engineering exhibits E-1 and E-2 reveals that the 1 mV/m contour was plotted 4.7 miles (7.6 km) from the proposed transmitter site on a bearing of 270 degrees true. However, both Exhibit E-5 and item 15 of Section V-B list this distance as 8.7 miles (14.0 km). In addition, along both the 225 degree radial and 315 degree radial the distances to the 1 mV/m contour specified in Section V-B, Item 15, were not calculated as prescribed in Section 73.313(e). The antenna height above average terrain (HAAT) along both the 225 degree and the 315 degree radials are below 30 meters in height. Pursuant to 47 C.F.R. § 73.313, "In directions where the terrain is such that antenna heights less than 30 meters for the 3 to 16 kilometer sector are obtained, an assumed height of 30 meters must be used for prediction of coverage. Southwest failed to assume an antenna HAAT of 30 meters for the radials in question. These errors have no effect on the acceptability of Southwest's application, which complies with all our technical acceptance requirements. Accordingly, Southwest shall submit an amendment with the correct 1 mV/m contour distance and the correct plot of the 1 mV/m contour distance, including the new area and population, within 30 days of the release of this Order.

3. *City Coverage / Line - of Sight.* In *Memorandum Opinion and Order in MM Docket 84-231,* released November 8, 1985, the Commission allotted channel 267A to Albuquerque with a site restriction of 6.7 km (4.2 miles) southwest. Because of the limitation of the site restriction all applicants have requested waiver of 47 C.F.R. Section 73.315. The Commission, however, no longer requires a waiver request where an applicant proposes to include more than 80% of the community of license within the 70 dBu contour. *See Letter to Southwest Communications, Inc. from Dennis Williams, Acting Chief, FM Branch,* dated July 16, 1986, citing *John R. Hughes et al.,* 50 Fed. Reg. 5679 (1985). Our analysis confirms that the proposal of Broadcasting is above the 80% coverage standard. Accordingly, the Broadcasting waiver request is not necessary and will be dismissed as moot.

(a) The engineering data submitted by the applicants below does not clearly demonstrate that they provide a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules:

APPLICANTS	WAIVER JUSTIFICATIONS
Gordon, Southwest, Enchanted, Ventures, Bernalillo, Radio, Capitol, Bradley and Limited	6.7 kilometer site restriction

(b) The following applicants have not shown circumstances which warrant a waiver of 73.315(a) and, accordingly, an appropriate issue will be specified:

Gordon, Southwest, Enchanted, Ventures, Bernalillo, Radio, Capitol, Bradley and Limited.[1]

4. *Enchanted*. Applicant indicates that it is not in compliance with Section 310 of the Communications Act of 1934, as amended, relating to interests of aliens. In its Exhibit 1, applicant states that Ms. Kate Friedman holds resident alien status in the United States and that "Her equity investment, together with any role in debt financing, would represent financial assistance by an alien party." Applicant specifies 11% as the percentage of capital stock owned of record or voted by the party. She is neither an officer nor director. Thus, it appears that Enchanted is in compliance with Section 310 of the Communications Act.

5. *Bernalillo*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Applicant has not completed Item 4 correctly. Bernalillo's application gives a post office box number as the residence address for its principals, Harrison-Jack Schmitt and Theresa A. Fitzgibbon. Accordingly, Bernalillo must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

6. *Radio*. On page 24, FCC Form 301, Mary Ann Fiske, a principal of applicant, has signed the application as "Secretary, Tucson Community Broadcasters". Page 1("Name of Applicant") specifies "Radio New Mexico c/o Mary Ann Fiske", while on page 3, Fiske is shown as "President" and Camille Chavez as "Secretary". Fiske shall submit an amendment clarifying what office, if any, she holds in applicant.

7. *EEO*. The Commission requires that if there will be five or more fulltime employees, the applicant must complete and file an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the five-point Model EEO Program. Radio has not listed any specific local source for attracting women or minority job applicants. Of the recruitment sources specified, Capitol has not listed any source for attracting either women or minority job applicants. Accordingly, each of the noted applicants will be required to amend their applications to provide the information.

8. The material submitted by the applicant below does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency:

APPLICANT	DEFICIENCY
Capitol	Responded "no" to section III, page 6, FCC Form 301("Financial Qualifications")

9. *Bradley*. Applicant has indicated that Bradley Construction, Inc., of which David L. Bradley is a principal, has pending before the EEOC an employment discrimination lawsuit filed by a former employee (EEOC Charge No. 063861248). An appropriate condition will be specified.

10. *Limited*. Information before the Commission indicates that Limited was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

An identical three-fold issue was specified in each proceeding: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than litigate the potentially disqualifying character issue. This unresolved character issue calls into question Limited's qualification be a Commission licensee. Therefore, since the issue remains unanswered, it will be specified and tried in this proceeding.

11. Item 5(e) of Section II, FCC Form 301 requires applicants to indicate if the applicant or any party to it has or has had an interest in "a broadcast application in any pending or concluded Commission proceeding which left unresolved character issues against the application." If answered in the affirmative, the applicant is to provide the name of the party having an interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location. Limited has responded to Item 5(e) in the negative. However, Commission records indicate that Richard W. and Wanda L. Hamming and Donald and Darlene Unger, general partners of Limited, are limited partners in the Evansville, Indiana proceeding, listed above. However, Limited has failed to timely amend its application

pursuant to 47 C.F.R. § 1.65 notifying the Commission of outstanding character issues. Accordingly, an appropriate issue will be specified below.

12. In its amendment filed July 22, 1987, Limited attempts to certify that no limited partner will be involved in the management or operation of the proposed station. Applicant's statement does not satisfy the certification requirement of Section II, Item 3(a) of FCC Form 301. Accordingly, applicant shall submit the proper certification to the presiding Administrative Law Judge.

13. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after August 7, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT FILED
Ventures	8/10/87
Broadcasting	4/13/88
Limited	10/27/88, 12/21/88/, 12/28/88

14. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

15. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the following applicants have been unsuccessful. Accordingly, since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by the applicants below would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding. *APPLICANTS:* Radio, Limited

16. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

17. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether the proposal of the following applicants would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section: Gordon, Southwest, Enchanted, Ventures, Bernalillo, Radio, Capitol, Bradley, and Limited.

2. To determine with respect to Capitol whether the applicant is financially qualified.

3. To determine whether Sonrise Management Services, Inc. is an undisclosed party-in-interest to the application of Limited;

4. To determine whether Limited's organizational structure is a sham; and

5. To determine whether Limited violated Section 1.65 of the Commission's rules, and/or lacked candor, by failing to report the designation of character issues against other applicants in which one or more of its partners has an ownership interest and/or the dismissal of such ownership interest and/or the dismissal of such applications with unresolved character issues pending.

6. To determine, from the evidence adduced pursuant to issues 3 through 5 above, whether Limited possesses the basic qualifications to be a licensee of the facilities sought herein.

7. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to air navigation: Radio, Limited.

8. To determine which of the proposals would, on a comparative basis, best serve the public interest.

9. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

18. IT IS FURTHER ORDERED, That Southwest shall submit the amendment, specified in Paragraph 2 above, to the presiding Administrative Law Judge within 30 days of the release of this Order.

19. IT IS FURTHER ORDERED, That the Broadcasting waiver request IS DISMISSED AS MOOT.

20. IT IS FURTHER ORDERED, That Bernalillo shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

21. IT IS FURTHER ORDERED, That Radio shall submit an amendment which contains the information specified in Paragraph 6 above to the presiding Administrative Law Judge within 30 days after the release of this Order.

22. IT IS FURTHER ORDERED That, Radio and Capitol shall file the amendment, as specified in Paragraph 7 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

23. IT IS FURTHER ORDERED, That, in the event a construction permit is awarded to Bradley as a result of this proceeding, its grant shall be without prejudice to whatever action, if any, the Commission may deem appropriate as a result of the outcome in the case noted in Paragraph 9 herein.

24. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Limited will provide the presiding Administrative Law Judge with the amendment specified in Paragraph 12 above.

25. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Broadcasting, Limited, Ventures.

26. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

27. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

28. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

29. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Capitol's contour map displays city boundaries that differ considerably from those shown by competing applicants. Using these boundaries, Capitol calculates its city coverage as 86.8%. However, using the boundaries shown by competing applicants, a Comission study has determined the coverage to be only 74%. Consequently, an issue will be specified as to Capitol.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-121

In re Applications of

P & S BROADCASTING, INC. (hereafter "P&S") File No. BPH-880107MW

JACKSON-NEUHOFF PARTNERSHIP (hereafter "J&N") File No. BPH-880107ND

For Construction Permit
for a New FM Station in
Athol, Massachusetts, Channel 260A.

HEARING DESIGNATION ORDER

Adopted: May 19, 1989; Released: June 5, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *J & N.* On March 21, 1988, J&N filed an amendment to change the ownership of the proposed application from an individual applicant to a general partnership. However, J&N failed to supply the requisite ownership information as required by Section II, Items 5 thru 10 of FCC Form 301, for Celine Jackson, the new general partner. Accordingly, J&N will be required to provide this information with the presiding Administrative Law Judge within 30 days of the release of this Order.

3. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by J&N would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by J&N would constitute a hazard to air navigation:

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That, within 30 days of the release of this Order, J&N shall file an amendment containing the requisite ownership information to the presiding Administrative Law Judge.

8. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-122

In re Applications:

KANSAS BROADCAST LIMITED PARTNERSHIP (hereafter KBLP) — File No. BPH-871103MA

LITTLE APPLE BROADCASTING (hereafter Little Apple) — File No. BPH-871104MB

For a Construction Permit
for a New FM Station on
Channel 284C2 in Manhattan, Kansas

HEARING DESIGNATION ORDER

Adopted: May 19, 1989; Released: June 5, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *KBLP*. Information before the Commission indicates that KBLP was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

An identical three-fold issue was specified in each proceeding: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than litigate the potentially disqualifying character issue. This unresolved character issue calls into question KBLP's qualification be a Commission licensee. Therefore, since the issue remains unanswered, it will be specified and tried in this proceeding.

3. Item 5(e) of Section II, FCC Form 301 requires applicants to indicate if the applicant or any party to it has or has had an interest in "a broadcast application in any pending or concluded Commission proceeding which left unresolved character issues against the application." If answered in the affirmative, the applicant is to provide the name of the party having an interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location.

4. KBLP has responded to Item 5(e) in the negative. However, Commission records indicate that Charles E. Sipe, Jr. a 3.3% general partner of KBLP was a limited partner in the Sedona, Arizona proceeding, listed above. Since, the filing of KBLP's application, character issues were added in the Sedona proceeding. However, KBLP has failed to timely amend its application pursuant to 47 C.F.R. § 1.65 notifying the Commission of the outstanding character issues. Accordingly, an appropriate issue will be specified.

5. *Little Apple*. As originally filed, the applicant indicated that it was an individual, Mr. Mike Law, and all relevant information pertaining to Mr. Law, as contained in Section II of FCC Form 301, was appropriately filed. On December 9, 1987, Little Apple timely filed an amendment to change the nature of its organization to a general partnership composed of Mr. Law and Mr. Larry Schlappi. The amendment, however, is incomplete as it does not contain pages 4 and 5 of Section II (Items 5 - 10) pertaining to Mr. Schlappi's legal qualifications. Accordingly, Little Apple will be required to submit this information in an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

6. KBLP petitioned for leave to amend its application on December 16, 1988. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party-in-interest to the application of KBLP.

2. To determine whether KBLP's organizational structure is a sham.

3. To determine whether KBLP violated Section 1.65 of the Commission's rules, and/or lacked candor, by failing to report the designation of character issues against other applicants in which one or more of its partners has an ownership interest and/or the dismissal of such ownership interest and/or the dismissal of such applications with unresolved character issues pending.

4. To determine, from the evidence adduced pursuant to issues 1 through 3 above, whether KBLP possesses the basic qualifications to be a licensee of the facilities sought herein.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That Little Apple shall submit an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order which contains the information required by pages 4 and 5 of Section II of FCC Form 301.

10. IT IS FURTHER ORDERED, That the petition for leave to amend filed by KBLP IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-424

In re Applications of

ASPEN FM, INC.	File No. BPH-850712PH
AJAX MOUNTAIN BROADCASTING CORPORATION	File No. BPH-850712PR

For Construction Permit for
a New FM Station on
Channel 296A (107.1 MHz)
in Aspen, Colorado

Appearances

Paul A. Zevnik and *Michael Horton* on behalf of Aspen FM, Inc.; *Howard Liberman, Jonathan Cohn* and *Laura Montgomery* on behalf of Ajax Mountain Broadcasting Corporation and *Jerry M. Hermele* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
WALTER C. MILLER

Issued: May 24, 1989; Released: June 5, 1989

PRELIMINARY STATEMENT

1. Originally fourteen mutually-exclusive applicants applied for authority to operate a new FM station on Channel 296A (107.1 MHz) in Aspen, Colorado. *See* 52 F.R. 37840 published October 9, 1987. Two remain: Aspen FM, Inc. (Aspen FM), and Ajax Mountain Corporation (Ajax).

2. After the interlocutory cycle had run its course and after the partial settlement agreements had been approved, the following four issues remain to be resolved:[1]

> 1. To determine whether Ajax Mountain Broadcasting Corporation is financially qualified to construct its FM proposal, and operate it for three months without revenue;
>
> 2. To determine whether Ajax Mountain Broadcasting Corporation misrepresented or lacked candor when it affirmatively certified its financial qualifications in BPH-850712PR, and, if so, what effect those misrepresentations and/or lack of candor has on its basic qualifications to be a Commission licensee;
>
> 3. To determine which of the proposals would, on a comparative basis, best serve the public interest; and
>
> 4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

3. An additional matter must be considered under the standard comparative issue. The Chief, Audio Services Division has called for comparative coverage evidence. *See* 52 F.R. 37840 *supra.*, para. 11.

4. We held the prehearing conference on January 6, 1988, an evidentiary admission on January 20, 1988, and hearings on February 16-19, 22-25, and May 16-18, 1988. The record was closed on May 18, 1988.

5. Both applicants, and the Mass Media Bureau,[2] filed their Proposed Findings of Fact on August 19, 1988. Aspen FM and Ajax filed Reply Findings on September 9, 1988.

FINDINGS OF FACT

Issue 1 - Ajax's Financial Issue

6. Under Issue 1 we must find out if Ajax is financially qualified to successfully prosecute its Aspen FM application, construct the station, and operate it for three months without revenue. This issue, unlike the false financial certification issue (Issue 2 *infra.*), looks forward. Stated another way, under the false financial certification issue, we must analyze the financial documents available to Ajax as of July 12, 1985, when they filed their application. Under Issue 1 we can look at financial data developed after that date.

7. Ajax estimates that it will cost $475,343 to construct and operate their FM proposal for three months without revenue. This $475,343 total is derived from four sub-cost estimates. First they have already spent $112,252 prosecuting their application this far (Ajax Ex. 14);[3] They estimate their equipment costs will total $118,291, and their other starting up costs at $125,000; and finally they believe it will cost them $119,800 to operate their station for the first three months (Ajax Ex. 13).

8. Ajax intends to meet its financial commitment through loans from its non-voting stockholder, Steven P. Hubert. Hubert, a Washington, D.C. area real estate developer has agreed to loan Ajax $683,000.[4] (Ajax Ex. 14).

9. The record shows that Steven Hubert has the requisite financial resources to meet his $683,000 commitment. He has available, as of April 28, 1988, $870,116 in unsecured lines of credit from the Maryland National Bank. Hubert is authorized to draw down on these lines of credit for investment in Ajax (Ajax Ex. 15; Tr. 3213-3216).

10. Aspen FM has launched a technical attack on Hubert's ability to activate his funds to lend Ajax after June 30, 1988. That's when his $870,116 credit line with the Maryland National Bank needs to be renewed. That attack is rejected. There is no reason to believe that Hubert cannot get that line of credit renewed.[5] He has never backed away from his commitment to provide up to $683,000 to Ajax, and he intends to loan Ajax the funds they need to complete the project (Ajax Ex. 14; Tr. 3298, 3312).

Issue 2 - Ajax's False Financial Certification

11. Under Issue 2 we must decide whether Ajax misrepresented or lacked candor when it affirmatively certified its financial qualifications in BPH-850712PR. Unlike the financial issue (Issue 1), here we must look at the financial documents that existed on July 12, 1985, when Ajax filed their application.

12. Ajax was well aware that if they wanted to vie for Channel 296A at Aspen, they had to have a viable application on file on or before July 12, 1985. Still they dallied around until the last minute. ABNI Exs. 47, 48, and 49.[6]

13. So it wasn't until July 10, 1985, that Sue Ann Todhunter certified to the truth and accuracy of the application they filed two days later. There, under Section III (Financial Qualifications), she represented " . . . that sufficient net liquid assets are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenues." She further represented " . . . that a reasonable assurance exists that all such [financial] sources have sufficient net liquid assets to meet these commitments."

14. Ajax's opponents have proven that both of these representations were abjectly false at the time they were made, and that Sue Ann Todhunter knew they were false. At the time Todhunter made those financial representations, Ajax had no bank commitment letter, no written debt underwriting commitment, and no written equipment time purchase arrangement. In short, no supporting financial documents existed at that time.

15. Ajax claims that there was a pre-July 12, 1985 written agreement between Steven Hubert (an Ajax nonvoting stockholder and lender of the funds) and Ajax's principals. That agreement was purportedly entered into on July 9, 1985, the day before Ms. Todhunter certified Ajax's application.

16. That claim must be rejected for any one of several reasons. In the first place, Ajax was unable to produce a copy of the July 9, 1985 Memorandum of Agreement *until* March 10, 1988 (after the Phase I hearing), although Todhunter had a copy in her possession as early as February 9, 1988 (before the Phase I hearing began). And the Presiding Officer never saw it *until* the Phase II exhibits were exchanged on May 2, 1988. *See* FCC 88M-269, released February 3, 1988; FCC 88M-250, released February 3, 1988; and Aspen FM Ex. 30. In fact, Ajax originally represented that *all* the copies of the pre-July 12, 1985 agreement had been either lost or destroyed. Also, when they finally did produce a copy of the agreement, it was produced under highly suspicious circumstances. *See infra*.

17. A second reason exists for rejecting the so-called July 9, 1985 Memorandum or Agreement. The face of the document that was finally produced shows that no agreement was entered into between Hubert and Ajax's principals on that day. Judi Francis, Ajax's Vice-President, Secretary, Director, and then 49% voting stockholder, never signed that agreement. She wasn't even present at the July 9, 1985 meeting between Steven Hubert and "Ajax's principals." Moreover, when Mrs. Francis, and the other three Ajax stockholders, finally did sign a Memorandum of Agreement, its terms were substantially different than those contained in the July 9th document. Compare Aspen FM Ex. 30 with ABNI Ex. 33.[7]

18. Moreover, the record demonstrates that Ajax's principals, including Ms. Todhunter and Steven Hubert, knew that there had been no meeting of the minds at the July 9th meeting. They knew it because they spent the next several months trying to arrive at a satisfactory arrangement. *See e.g.* ABNI Exs. 16, 22, 24, 29, 30, 31, and 32. In fact, it appears that they never really reached a *full* accord until late April, 1988. *See* Ajax Ex. 14.

19. Even *assuming* that Aspen FM Ex. 30 was a binding agreement between Hubert and Ajax, that document could not possibly give Ms. Todhunter any assurance "... that sufficient net liquid assets are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenues."

20. The July 9, 1985 Memorandum (Aspen FM Ex. 30) does not commit Hubert to provide $683,000 (the amount Ajax claims it needed). Rather Hubert was to provide funds in four distinct and separate phases, and he had to expressly approve continuing to the next phase. *See* Aspen FM Ex. 30, Articles IV, and VIII. So the so-called July 9th agreement between Hubert and Todhunter only obligated Hubert to provide Phase I funding of $18,000, and even that amount had to be secured by a Promissory Note. *See* Aspen FM Ex. 30, Promissory Note dated July 9, 1985.[8] So the face of the document itself couldn't reasonably assure Ms. Todhunter (and presumably Ms. Francis) that they would get anything more than $18,000.

21. The record evidence fully supports the previous finding, *i.e.*, that Hubert's commitment is a distinct and separate four-phase commitment and that both Hubert and Todhunter so view it. *See* e.g. ABNI Ex. 43, 59, and 60.

22. There is yet another reason for rejecting Ajax's bare assertion that a reasonable assurance exists that Steven Hubert, on July 10, 1985, had sufficient net liquid assets to meet his commitments. In *Las Americas Communications, Inc.*, 1 FCC Rcd 786 (1986) at para. 10, the Review Board held in a part:

> " . . . where individuals are providing funds, they must also support their undertakings with balance sheets or financial statements . . . . This is so even though there is a presumption that 'ownership of nonliquid assets several times the value of the cash which such assets are relied upon to yield' provides reasonable assurance of the ability to secure the required funds. . . . without documentary evidence ...the presumption of ready liquidity (needed for reasonable assurance) does not arise."

23. Hubert never made either his balance sheet or a financial statement available to Sue Ann Todhunter before she certified Ajax's finances on July 10, 1985. She knew nothing about his ready liquidity. In truth, as of July 9, 1985, Hubert did not have the liquidity to make a loan to Ajax. In 1985, Hubert's lines of credit were available solely for real estate investments (Tr. 3209-3213). Moreover, and at no time before May 1988, did Hubert even seek approval to use his credit line at the Maryland National Bank to invest in Ajax (Tr. 3214-3216). So as of July 9, 1985, there was no presumption that Hubert possessed the ready liquidity to meet his four-phase commitment to Ajax.

24. *Issue 2 - Intermediate Findings.* Ajax Mountain Broadcasting Corporation lacked candor when it affirmatively certified its financial qualifications in BPH-850712PR. Having waited until the last minute to firm up their July 12, 1985 application, Sue Ann Todhunter knew that there were no sufficient net liquid assets on hand or available from committed sources to construct and operate the requested facilities for three months without revenue. The most she knew on July 10, 1985 (the date she certified) was that a possible lender, Steven Hubert, existed, and was willing to negotiate a deal in return for a 60% equity interest in Ajax. She knew no deal had been finalized. Yet she certified directly to the contrary.

25. Even *assuming* that she mistakenly believed that Ajax had an agreement with Hubert under which Hubert would provide the funds, Ms. Todhunter had no reasonable assurance that Hubert had sufficient net liquid assets to meet his commitments. She'd never seen his balance sheet or financial statement. So she knew nothing about Hubert's ready liquidity. Yet she certified to the contrary. Such a lack of candor mandates denial of Ajax's application.

Issue 3 - The Standard Comparative Issue Description of Applicants

26. *Aspen FM, Inc.* Aspen FM, a California corporation, has two classes of stock: voting common stock and non-voting common stock. There are 2,100 shares of voting stock authorized, and 7,900 shares of non-voting stock. So far, only common voting stock has been issued. Each share of common voting stock represents one vote. There are only two stockholders. The following chart summarizes Aspen FM's ownership structure (FM Ex. 1, pp. 1-2):

CHART

Shareholder	Voting Shares	Ownership Percentage	Positions Held
Martha Tapias	1,600	76.2%	President, Secretary, Director
Cynthia Chardoonay	500	23.8%	Vice-President, Chief Financial Officer, Director

27. On July 12, 1985, FM's directors entered into a loan agreement with Wilkinson Capital Corporation. Wilkinson agreed to lend FM $62,500. Under the terms of the agreement, and if FM hasn't prepaid the entire amount of the loan, Wilkinson can convert the outstanding amount of the loan into non-voting common stock. There is no potential under the agreement for Wilkinson to exercise any control over FM. The Wilkinson-FM agreement has been modified on two occasions to reflect the impact that certain subsequent settlement agreements had on the 1985 agreement. *See* FCC 88M-1787 released June 9, 1988, and FCC 88M-2740 released August 23, 1988.

28. Later, during the hearing, FM entered into a settlement agreement with Aspen Broadcasting (AB). Under the terms of that agreement, AB dismissed its application, and lent FM $65,000. FM is to repay the loan if, and only if, it is awarded the 296A construction permit. The loan took the form of a convertible debenture that entitles AB to receive 2,500 shares of FM non-voting common stock. In addition, AB has agreed to purchase $200,000 worth of FM selected station equipment and facilities and lease them to FM under a seven-year agreement. *See* FCC 88M-2740 *supra.*

29. *Ajax Broadcasting Corporation.* Ajax, a Colorado corporation, filed its application on the deadline date, July 12, 1985. There they *represented* their ownership structure as follows (BPH-850712PR, Section 2, page 2, 5(a)):

CHART

Principal	Office Held	Director	% of Ownership
Sue Ann Todhunter	President, Treasurer	yes	51% voting stock
Judi Francis	Vice Pres./ Secretary	yes	49% voting stock
Robert Francis		yes	
Steven P. Hubert		no	100% nonvoting stock

30. *Ajax's Original Ownership Structure.* As previously noted, Ajax's opponents demonstrated that Ajax's financial certification was false (Findings 11-25 *supra.*). But they also showed that Ajax's ownership structure wasn't in place when Ajax *represented* it was. As the chart shows when Ajax filed its application on July 12, 1985, they didn't set out the actual *equity* ownership percentages for Todhunter, Francis, and Hubert. So the original representation was both incomplete and susceptible to being misleading. Moreover, the ownership representations Ajax made to the Commission on July 12, 1985 are inconsistent with the Memorandum of Agreement that Sue Ann Todhunter and Steven Hubert had purportedly entered into just three days earlier (Aspen FM Ex. 30). That agreement stated that Steven P. Hubert would have 30,000 shares of non-voting stock, while Sue Ann Todhunter and Judi Francis, together, would have 20,000 shares of voting stock.

31. Thus if, for equity ownership purposes, a share of voting stock and a share of nonvoting stock are equal, Hubert would hold 60% of Ajax's equity under the July 9th Memorandum, but only 50% as represented in the July 12, 1985 application. In addition, the parties later kept revising the Memorandum of Agreement. That too is a clear indicator that Ajax's ownership structure wasn't in place when they represented it was. In fact, as of September 6, 1985, Steven Hubert had not as yet returned his executed offer to purchase (ABNI Ex. 1; Tr. 584).

32. *Ajax's Amended Ownership Structure.* Not only was Ajax's financial certification a misrepresentation, and not only were their July 12, 1985 ownership representations false, the subsequent ownership representations they made to the Commission in their September 13, 1985, ownership amendment proved false.

33. After the application was filed on July 12, 1985, but before the September 13, 1985 deadline for filing viable amendments, Ajax decided to insert a female minority into their ownership structure. They settled on Johnnie Mae Alderfer, a black female, and an Aspen resident. Although the record demonstrates conclusively that Ajax hadn't executed this ownership change by the September 13th deadline, they nevertheless represented to the Commission they had. They represented that Johnnie Mae Alderfer had become a part of Ajax on September 11,

1985, and that the amended ownership structure was as follows (Tr 5491-551; 642; and BPH-850712PR, September 13, 1985, Attachment 2 - Ownership changes):

CHART

Shareholder	Shares Held	% of Voting or non-voting	Equity Ownership
Sue Ann Todhunter	102 voting 192 non-voting	51% voting 24.6% non-voting	30%
Judi Francis	49 voting	24.5% non-voting	5%
Johnnie Mae Alderfer	49 voting	24.5% voting	5%
Steven Hubert	588 non-voting	75.4% non-voting	60%

34. At this juncture certain preliminary findings on the September 13, 1985 amendment can be made. Note first that the number of shares held by each shareholder bears no resemblance whatsoever to the so-called July 9, 1985 Memorandum of Agreement (Finding 30 *supra*.). There Todhunter and Hubert agreed that Hubert would hold 30,000 shares of non-voting stock (not 588 shares) and that Todhunter and Mrs. Francis would each hold 20,000 shares of voting stock (not 102 and 49).

35. Next, note that something more occurred between July 12th and September 13, 1985, something more than inserting Johnnie Mae Alderfer into the ownership structure. Sue Ann Todhunter markedly increased her equity ownership (from 20% to 30%) apparently at the expense of Judi Francis (from 20% to 5%). Thus, it appears that Judi Francis not only gave up 5% equity to Mrs. Alderfer, she gave Sue Ann Todhunter an additional 10%. Note also that Sue Ann Todhunter no longer holds only voting stock, she also now holds non-voting stock (compare Findings 27 and 31).[9]

36. Next, note that the representations Ajax made to the Commission on September 13,1985, are totally inconsistent with a Memorandum of Agreement its principals signed the day before *(see* ABNI Ex. 33). That agreement provided that Mrs. Francis and Mrs. Alderfer would each only hold 24.5 shares of Ajax stock, thereby reducing their equity ownership to 2.5% each - not 5% each.

37. One additional preliminary finding. In Ajax's September 13, 1985 amendment, Judi Francis' husband, Robert Francis isn't listed as an Ajax director, Ajax said "as of September 11, 1985, Mr. Robert Francis is no longer a Director of Ajax." Yet the record evidence shows the contrary (*See* ABNI Exs. 13 and 23). In fact Ajax's own documents show Robert Francis as an Ajax director on September 28, 1986.

38. The record is also clear that Ms. Alderfer wasn't legally a part of the Ajax ownership structure on September 13, 1985, when Ajax represented to the Commission she was. In fact, on October 17, 1985, Alderfer hadn't signed on yet. On that day Ms. Todhunter wrote Johnnie Mae Alderfer in part as follows (ABNI Ex. 51):

> "Judi and Bob Francis also asked me to follow-up on their request that you pick up the stock certificates in Bob's office and sign the appropriate documents. . . . If there's a problem with the $50, don't worry about it for the time being, but we really do need to get all the documents signed and in order by the end of the month at the latest."

39. *A Classic Sham Application*. Ajax's opponents have shown that: (1)Ajax falsely certified that they were financially qualified (findings 11-25 *supra);* (2) they misrepresented their original ownership structure to the Commission (Findings 30-31 *supra);* and (3) that they misrepresented their amended ownership structure to the Commission (Findings 32-38 *supra*). But it doesn't end there. Ajax's opponents have shown that Ajax's application is a sham. They have demonstrated that Glen Gerberg, who is now Sue Ann Todhunter's husband, is an undisclosed principal in the Ajax application.

40. Glen Gerberg and Sue Ann Todhunter originated the idea of applying for Channel 296A in Aspen. At that time they had not yet married,[10] but were living together in Boulder, Colorado, and were proposed integrated principals in Timberline Broadcasting, an FM applicant for Frisco, Colorado (Tr. 676, 1333-1337, 1519, 2941, 3515; ABNI Ex. 45).

41. Gerberg was the moving force behind Timberline. As well as being a Timberline principal, he functioned as the FCC attorney for the group. The Frisco proceeding was a contested case and Gerberg became familiar with FCC procedures, and especially its financial requirements (Tr. 3120). Administrative Law Judge Joseph Chachkin denied Timberline's application on August 8, 1985 (FCC 85D-51).

42. Meanwhile, in January 1985, Robert Francis, an Aspen attorney, visited Gerberg at the television station where Gerberg worked. Francis had known Gerberg since both had lived in Aspen at one time. Neither Francis nor Gerberg have ever had an ownership interest in a broadcast station, but they both wish they did (Tr. 548-549, 676-679, 680, 1345-1346). During their conversation Gerberg mentioned that there was a frequency available in Aspen. After some discussion, Francis suggested that his wife, Judi Francis, become a part of any efforts made by Gerberg and Todhunter to apply for the Aspen frequency. As a result of this meeting and later telephone calls, they decided that Sue Ann Todhunter, and Judi Francis would be the principals of a company initially to be known as Ajax Broadcasting Company.

43. Gerberg, Todhunter and Robert Francis further agreed that Gerberg's "name" wouldn't "be on" the application. Rather, Gerberg would be a consultant to the applicant, and that he would enter into a "consulting agreement" with Todhunter.[11] Gerberg did enter into a consulting agreement with his housemate on February 16, 1985 (ABNI Ex. 45).

44. Under the February 16, 1985 agreement, Gerberg was to help the Aspen FM project select its transmitter site; he was to work with the engineering firm; he was to provide site analysis and engineering design; and he was to provide follow up work on the application (ABNI Ex. 45).

45. In return the Aspen FM Project purportedly agreed to pay Gerberg $50 per hour, and a $2,500 retainer. The parties further agreed that Gerberg would will Ajax "every 30 days." Todhunter signed the consulting agreement, but she doesn't know if the Ajax Board has ever ratified it. Ajax's records show that as of July 1985, they owned

Gerberg $6,750. He has been paid about $3,000 of it to date. This includes his out-of-pocket expenses (Tr. 1342, 1346-1351, 1538-1539).[12]

46. However, Gerberg has engaged in activities that go far beyond the scope of the consulting agreement. It was Gerberg and Todhunter who retained Howard Liberman as FCC counsel. He provided information to Liberman to be included in the application, and reviewed it before it was filed (Tr. 1883-1884). When an engineering problem arose, Gerberg selected the engineering firm. He sent a draft application to Liberman and coordinated the underlying details with Liberman. On July 2, 1985, he wrote Liberman and indicated that "[a] shareholder's agreement is being drawn up and we will call you about that . . . " (ABNI Ex. 49, p. 1).

47. When Liberman corresponded with Gerberg, he referred to the Ajax application as "your application" and told Gerberg that "you will have to have an application on file with the FCC in Washington . . . " (ABNI Ex. 47, 1). In a June 17, 1985 letter to Gerberg, Liberman asks: "Have you obtained financing? Have you retained a consulting engineer?" (ABNI Ex. 48).

48. Throughout this proceeding Gerberg has corresponded directly with Liberman, Yvonne Schell (Hubert's agent), and Robert Francis. (ABNI Exs. 47-49). He has had numerous phone conversations with both Hubert and Francis (Tr. 698, 704-705, 715-716, 723-724, 790, 1371, 2256-2258), and has met with Schell on several occasions (Tr. 1550). Indeed Robert Francis has worked more with Gerberg than he did with Todhunter (Tr. 818-819). Francis consulted with Gerberg on the division of Ajax stock (Tr. 2257). In fact, when Francis sent his March 1, 1986 legal bill to Ajax, he added this notation: "Glen, what are your thoughts on handling this?" (Tr. 2257-2258).

49. The record further demonstrates that Gerberg helped develop the Ajax business plan, went with Judi Francis to Houston to discuss Ajax financing with potential investors, helped try to solicit San Diego investors for Ajax, regularly attended meetings of Ajax principals, and dealt with the FAA on Ajax's behalf.

50. *Intermediate "Sham" Facts.* Based on the record (Findings 37-47 *supra)* it is found that Glen Gerberg is indeed an undisclosed principal in the Ajax application. The record further reveals that Todhunter and Gerberg are perfectly willing to deceive the Commission on questions of ownership structure. For example, on October 2, 1985, Ms. Todhunter wrote Steven Hubert (Ajax's nonvoting stockholder), and said this:

> " . . . we have just recently become aware of a two-year-old FM station in Winter Park, Colorado ... we thought we should offer you the first opportunity to become involved. Of course, neither my name nor Glen's could appear on the application, as it would create a media diversification problem with our Aspen application, but we could be involved in a consulting capacity . . . We'll keep you posted . . . " (ABNI Ex. 60, p. 2).

51. *Corroborating Events.* Ajax's principals have known all along that they had falsely certified their financial qualifications, lied about their original ownership structure, misrepresented their amended ownership structure, and tried to slip an undisclosed real-party-in-interest past the Commission. Their conduct throughout the hearing makes it evident that they were aware of their evidentiary shortcomings. Several examples of such conduct will suffice.

52. For example, they were aware that they had numerous documents in their possession that would show that their financial certification was false, and that their ownership structure was a "sham." But rather than make those documents available on discovery, Ajax's principals deliberately abused the Commission's discovery procedures. *See* FCC 88M-679 released March 10, 1988.

53. Ajax's principals knew they would be unable to prove that their original ownership structure was firmed up before July 12, 1985, and their amended ownership structure by September 13, 1985. So they deliberately and falsely back dated documents to make it appear that they had entered into those transactions on the earlier date (*See e.g.,* ABNI Exs. 29, 30, 31, 32 and 33). In fact, in one instance when he subscribed to his 58 nonvoting shares of stock, Steven Hubert deliberately left the month and day on the payment check blank and Judi Francis filled in the date of "September 6" at a later date. Then she and Sue Ann Todhunter lied at the hearing about when they had received it. Actually the check was not even deposited until October 7, 1985 (*See* ABNI Exs. 11 page 4; ABNI Ex. 27-28; FM Ex. 45; Tr. 584, 592, 1006, 1010, 3032, 3387, and 3393).

54. In an effort to make it appear that Johnny Mae Alderfer had fulfilled all her legal obligations, and was an Ajax principal on September 11, 1985 as represented (*See* Finding 33, *supra.*), Sue Ann Todhunter swore that Ms. Alderfer had paid for her stock in September. Later, at the hearing, it developed that Todhunter had lied, and knew she lied. In a letter to Ms. Alderfer dated October 17, 1985, she said " . . . if there's a problem with the $50, don't worry about it for the time being." Alderfer paid for her stock by check dated October 23, 1985 (Tr. 1656, 1662, 1665-1667, ABNI Ex. 51, Ex. 54 and Ex. 58).

55. Moreover, at the hearing while Ms. Alderfer was being questioned about her role in Ajax, Ajax's counsel *unilaterally* pulled her off the witness stand without permission, and sent her back to Aspen, Colorado (Tr. 1504-1510, 2663-2666, and 3359). To this day her cross-examination has never been completed. Moreover, although Judi Francis fulfilled all her hearing obligations, she proved to be a recalcitrant witness, and of little value in our search for truth *(see* FCC 88M-1422 released May 13, 1988; FCC 88M-679 *supra.*, at para. 17; and Tr. 1040-1052).

56. The foregoing (Findings 51-55 *supra.*) more than justifies the finding that Ajax has known from the outset that they have been less than candid with the Commission on several vital topics. They have tried to hide that lack of candor by abusing discovery, making additional outright misrepresentations, and doctoring documents.

Diversification of Mass Media

57. *Aspen FM, Inc.* Neither FM, nor its voting principals (Martha Tapias and Cynthia Chardonnay) have any interest in any medium of mass communications. While Ms. Chardonnay has held management positions in Aspen area stations, she has consistently pledged to leave such employment, and meet her integration promises at FM's proposed station.

58. A potential future non-voting shareholder in FM is the Wilkinson Capital Corporation. *See* Finding 27 *supra*. Neither the Corporation nor its controlling shareholders (Philip Wilkinson and his wife Wendy) hold an ownership interest in any medium of mass communications. (Joint Ex. 3, pp. 1-4).

59. Another potential future non-voting stockholder in FM is Aspen Broadcasting (AB). *See* Finding 28 *supra*. AB is a Texas general partnership. 80% of AB is owned by general partner, Texas Television, Inc. (TTI).

60. TTI is: (1) the licensee of KIIJ-TV, Corpus Christi, Texas; (2) majority stockholder of Texas Telecasting, Inc., licensee of KBMT-TV, Beaumont, Texas; and (3) licensee of Channel 42 of Austin, Inc., holder of a 45% interest in KBVO-TV, Austin, Texas.

61. *Ajax Broadcasting Corporation*. Neither Ajax, nor its officers, directors or shareholders have any interest in any medium of mass communications.

Best Practicable Service

62. *Comparative Coverage*. Aspen FM would serve 13,264 people over a 2,215 square kilometer area. All of the areas that both applicants propose to serve already receive at least five aural services during the day.

63. However, nighttime service is a different matter. Aspen FM would bring a signal to some underserved areas, while Ajax would not. Aspen FM proposes a 3rd nighttime service to 224 people (115 sq. km); a 4th nighttime service to 216 people (103 sq. km.); and a 5th nighttime service to 354 people (130 sq. km.).

64. Since Aspen FM will serve 2,530 more people (27.95%) more than Ajax, since Aspen FM will also provide a new third, fourth, and fifth nighttime service to almost 800 people, and since Ajax proposes no overage at all to underserved areas, Aspen FM will be awarded a slight preference over Ajax. *See Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 1113 (Rev. Bd. 1984).

65. *Integration of Ownership with Management: Aspen FM* seeks 100% quantitative integration. They intend to integrate both voting shareholders, Martha Tapias, and Cynthia Chardonnay into the proposed station's daily operations.

66. First, they will integrate *Martha Tapias*, the President, Secretary, Director, and 76.2% voting stockholder into their daily operations. Tapias will work a minimum of 40 hours a week as the station's Sales Manager. In that capacity she will supervise all local, regional, and national sales functions, including all account executives and sales representatives. Although she doesn't live in Aspen, she will move to, and establish her permanent residence there if Aspen FM is granted.

67. Martha Tapias was born in the United States on January 22, 1960 and is a United States citizen. She lives at 6607 Columbus Avenue, Van Nuys, California. She graduated from the University of California in 1982 with a B.S. in Business Administration, concentrating in finance and marketing. Ms. Tapias studied in Spain while at USC, and is fluent in Spanish.

68. From 1982 and 1984, Ms. Tapias was an account executive for American Telephone and Telegraph in Los Angeles, California. She specialized in providing voice and data communications services to radio and television broadcast stations.

69. From April 1984 to the present. she has been a network and national spot sales account executive for Univision, a national television network. (formerly the Spanish International Network).

70. Martha Tapias claims qualitative enhancement for being a female Hispanic. She is of Mexican descent. Both of her parents were born in and around (and grew up in) Teocaltiche, Jalisco, Mexico.

71. Aspen FM will also integrate *Cynthia Chardonnay*, Vice President, Chief Financial Officer, Director, and the remaining 23.8% stockholder into their daily operations. She will work a minimum of 40 hours a week as the station's General Manager. In that capacity she will supervise all station functions, including all programming, news, business sales, and engineering functions. She will also administer and implement the proposed station's Equal Employment Opportunity Program.

72. Cynthia Chardonnay was born on October 11, 1943. She currently resides in Basalt, Colorado, within Aspen FM's proposed service area. She has resided in the immediate Aspen area continuously since 1975.

73. Ms. Chardonnay has past broadcast and media experience. From March 1975 to January 1976, she was co-publisher of the Aspen Publishing Co. (*The Aspen Catalog*), a publication containing advertising for the Aspen area. From March 1976 to May 1987, she was the Sales Manager for the weekly news paper, *The Aspen Journal*.

74. Between 1977 and 1983, she was an account executive at KSNO(AM), Aspen, Colorado, and KSPN(FM), Aspen Colorado. She later was promoted to sales manager and then to general manager of KSPN(FM).

75. From January 1984 to November 1986, Ms. Chardonnay was general manager of the *Aspen Daily News*, the only daily newspaper in Aspen. From March 1987 until February 1, 1988, she was general manager of KSNO-FM, Snowmass Village, Colorado, and KTYE(AM), Aspen, Colorado.

76. Ms. Chardonnay also has some limited civic activities. From July 1984 to July 1986, she was on the membership committee of the Aspen Resort Association, a nonprofit organization that promotes the Aspen community. From July 1987 to the present, she has served on the Marketing Committee of that Association.

77. Cynthia Chardonnay claims female qualitative enhancement.

78. *Integration of Ownership with Management: Ajax* seeks 100% quantitative integration. They ostensibly[13] intend to integrate all three voting stockholders, Sue Ann Todhunter, Judi Francis, and Johnnie Mae Alderfer into their proposed station's day-to-day operations.

79. First, Ajax intends to integrate their President, Treasurer and Director, *Sue Ann Todhunter*, into the proposed station's day-to-day operation as general manager.[14] Todhunter will work full-time, at least 40 hours a week, directing the overall station operation, and participating in the day-to-day decision making. She will also oversee the station's financial affairs, be responsible for contacts with the FCC, and oversee the station's Equal Employment Opportunity Program.

80. Sue Ann Todhunter was born on October 15, 1948, and lives in Boulder, Colorado. She will move to Aspen if Ajax's application is granted. She previously lived in Aspen from September 1981 to May 1984.

81. Ms. Todhunter has past broadcast experience. From December 1970 to August 1971 she was assistant program director at WBOS-FM, Boston, Massachusetts, and from August 1971 until 1972, she was the office manager, the bookkeeper, and a news reporter for WNTN(AM).

82. From August 1978 through January 1980, Ms. Todhunter was the business manager, an on-air announcer and a member of the board of directors of KGNU-FM, Boulder, Colorado. She then moved over to KBCO-FM, Boulder as an on-air announcer; she also did production work.

83. After she moved to Aspen in September 1981 and until she moved back to Boulder in May 1984, Todhunter was an on-air announcer, co-op director, traffic manager, and receptionist for KSPN-AM, Aspen. From August 1982 through 1983, she also was an on-camera news anchor, camera person, feature interviewer, office manager and bookkeeper, and did production work for the Aspen cable program "Aspen AM" on Channel 12. In 1983-1984, Ms. Todhunter also was the technical director and a camera person for TV-2, and cable TV channel serving Aspen.

84. Ms. Todhunter claims qualitative enhancement for being a female. While she was in Aspen, she became one of the founding members of Les Dames d'Aspen, an organization that raises funds for the local ballet. She also co-chaired a fund-raiser for the Wildwood School during the fall of 1983. She was a security volunteer for the Aspen Wine Classic in July 1983, and a volunteer for the Red Roof Golf Tournament benefit in 1983.

85. Ajax will also integrate *Judi Francis* into the proposed station's day-to-day operations. Francis, who has only a 5% equity interest in Ajax (49 voting shares),[15] will serve as the full-time (at least 40 hours per week) news director. In that capacity she will oversee the station's news gathering, news broadcasting, and public affairs programming.

86. Ms. Francis was born on February 15, 1943. She resides in Aspen Colorado, and has resided there since 1971. She graduated from the University of Michigan in 1966 with a B.S. in education. She also did graduation work in educational psychology and science there between 1966 and 1970.

87. Between 1966 and 1970 she taught elementary school in Ann Arbor, Michigan. She has taught on a substitute basis on all levels in the Aspen School System. Since 1973 she has been a ski instructor, and a member of the Aspen Ski Instructors Association.

88. Francis has been civically active in Aspen. From 1980-1982 and again from 1985 through 1986, she was a board member of the Meadowood Home Owners' Association. Since 1980 she has been a fund raiser for the Aspen Ballet and Aspen Visual Arts Center, and a parent adviser for the Aspen Public Schools. She has been a board member of Les Dames d' Aspen since 1983.

89. From 1980 through 1984 she was a board member of the International Wine and Food Society; she was the corresponding scribe for that society in 1986-1987; and she is currently its vice-president. She has been a security officer at the Aspen Wine Classic since 1983. Judi Francis also claims qualitative enhancement for being a female.

90. Ajax also intends to integrate *Johnnie Mae Alderfer* into their proposed station's day-to-day operations. Alderfer, who has only a 5% equity interest in Ajax (49 voting shares),[16] will be the full-time (at least 40 hours a week) sales manager. In that capacity she will direct all sales activity, and be in charge of recruiting and hiring all sales personnel.

91. Ms. Alderfer was born on December 30, 1938. She is a Black female and resides in Aspen, Colorado. She has lived in the Aspen area since 1967. She has been the owner and manager of Alderfer Antiques and Interiors since 1983. She will curtain her antique activities if Ajax's application is granted.

92. Ms. Alderfer has some broadcast experience. She has worked in sales and done commercials for "Aspen Am", a television program in Aspen between 1982 and 1983. She also appeared in commercials for "Aspen AM" during the same period. She was an actress on the local television program "Edge of Ajax" from 1982 through 1983.

93. She has also been civically active in Aspen. From 1972 through 1984, she worked as a volunteer for the Music Association of Aspen. She served as a "blue lady" volunteer at the Aspen Valley Hospital from 1976 through 1978. She was a volunteer receptionist at the Aspen Art Museum from 1980 through 1981. From 1984-1986 she did volunteer work for Les Dames du Ballet, a support group for Ballet West. She currently does volunteer work at The Thrift Shop in Aspen, and has done so since 1983. All proceeds from The Thrift Shop go to local Aspen charities.

94. *Auxiliary Power:* Both Ajax and Aspen FM will restall auxiliary power to provide power, if there is a local power failure.

Ultimate Facts and Preliminary Conclusions of Law

1. Two applicants remain in the running for FM Channel 296A (107.1 MHz), Aspen, Colorado: Aspen FM, Inc. (Aspen FM), and Ajax Mountain Broadcasting Corporation. (Ajax)

2. Evidence was adduced on three factual issues. Ajax faces two basic qualifying issues: a financial issue, and a false financial certification issue. (Issues 1 and 2 *supra.*). The third factual issue is the standard comparative issue (Issue 3 *supra.*).

Ajax's Basic Qualifying Issues

3. We must first determine if Ajax is basically qualified to be a Commission licensee. This means that we must first resolve the financial and the false financial certification issues that have been designated against them. For it is axiomatic that only basic qualified applicants are entitled to a comparative analysis. *See e.g., Louis Adelman*, 29 FCC 1223, 18 RR 1062 (1960) *affirmed sub. nom. Guinan* v. *Federal Communications Commission*, 297 F. 2d 782; 22 RR 2026 (1961).

4. *Issue 1 - Ajax's Financial Qualifications*. Ajax is financially qualified. They need about $476,000 to construct and operate their FM proposal for three months without revenue. Their non-voting stockholder and 60% equity holder, Steven Hubert, has agreed to lend them $683,000. So Issue 1 poses no bar to further consideration of Ajax's application. *See* Findings 6-10 *supra*.

5. *Issue 2 - Ajax's False Financial Certification*. Issue 2, however, is another matter entirely. The record evidence demonstrates conclusively that Ajax misrepresented and lacked candor when it affirmatively certified its financial qualifications in BPH-850712PR.

6. On July 10, 1985, Sue Ann Todhunter (Ajax's president and proposed general manager) swore "that sufficient net liquid assets are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenues." She further swore " . . . that a reasonable assurance exists that all such [financial] sources have sufficient net liquid assets to meet those commitments."

7. Both those representations were false, and Sue Ann Todhunter knew they were false when she made them. At the time she made them, Ajax had no bank commitment letter, no written debt underwriting commitment, and no written financial equipment time purchase agreement. In brief, at the time she certified to the Commission that she was financially qualified, she didn't have the *sine qua non* for such a certification; *i.e.*, the appropriate written documents, and she was aware of it. So Ajax's application must be denied. *See Las Americas Communications, Inc.*, 61 RR 2d 1008 (Rev. Bd. 1986); 1 FCC Rcd 1986. *See* Findings 11-19, and 24 *supra*.

8. Moreover, at the time she certified Sue Ann Todhunter knew that there weren't sufficient net liquid assets on hand or available from committed sources. The most she knew on July 10, 1985, was that a potential source of funds, Steven Hubert, existed and was willing to negotiate a deal in return for a 60% equity interest in Ajax. But she knew that no financial agreement with Hubert had been finalized, and she had never seen Hubert's balance sheet or financial statement. So she knew nothing about Hubert's ready liquidity. Actually, on July 9, 1985, Hubert didn't legally have the liquidity to make a loan to Ajax. Yet Todhunter certified to the contrary. Such a lack of candor also mandates denial of Ajax's application. *See Las Americas Communications, Inc. supra.*, at para. 10. *See* Findings 20-23 and 25 *supra*.

9. The evidence of record also shows that Sue Ann Todhunter is more than willing to deceive the Commission if it works to her benefit. On October 2, 1985, shortly after Ajax filed their Aspen application, Sue Ann Todhunter wrote Steven Hubert a letter. There he said:

> " . . . We have just recently become aware of a two-year old FM station in Winter Park, Colorado . . . We thought we should offer you the first opportunity to become involved. Of course, neither my name nor Glenn's could appear on the application, as it would create a media diversification problem with our Aspen application, but we could be involved in a consulting capacity . . . We'll keep you posted . . . " *See* Finding 50 *supra*.

10. The record also corroborates that Ajax's principals, including Sue Ann Todhunter, were fully aware that they had lied to the Commission. Their conduct during the hearing attests to that. They tried to hide incriminating documents, and in so doing, they abused discovery. They deliberately back-dated documents to make it appear that they existed at an earlier date. Both Todhunter and another Ajax principal, Judi Francis, continued to lie about the dates on documents during the hearing. When Johnnie Mae Alderfer was being questioned about when she became an Ajax principal, Ajax's counsel *unilaterally* pulled her off the witness stand and sent her back to Aspen, Colorado. To this day her cross-examination has never been completed. *See* Findings 51-56 *supra*.

11. Based on the foregoing (Conclusions 5-10 *supra*.) It is concluded that Ajax falsely certified its financial qualifications in BPH- 850712PR and is not of fit character to be a Commission licensee. *See e.g., Nick J. Chaconas*, 28 FCC 2d 231 (1971), *recon. denied*, 35 FCC 2d 699 (1972) *aff'd sub. non Chaconas* v. *FCC*, 486 F. 2d 1314 (D.C. Cir. 1973); *WHW Enterprises, Inc.* v. *FCC*, 753 F. 2d 1123, 1139 (D.C. Cir. 1985); and *William M. Rogers*, 92 FCC 2d 187, 199 (1982).

Issue 3 - The Standard Comparative Issue

12. With Ajax's disqualification no comparative conclusions are needed.[17] Ajax is unfit to be a Commission licensee, Aspen FM is fit. So Aspen FM's application will be granted.

13. However, and *assuming* that Ajax were of fit character to be a Commission licensee, the Presiding Officer will offer the following observation on comparative findings 26-94.

14. Under those Findings Aspen FM would be entitled to 100% quantitative integration, Ajax would get 0% quantitative integration. Ajax's application is a classic "sham" application from two aspects. *See Kist Corp.*, 102 FCC 2d 288 (1985) *aff'd percuiam sub. non. United American Telecasters, Inc.*, 801 F. 1436 (D. C. Cir. 1986) (Tabb), *cert. denied* 107 S. Ct. 2182 (1987).

15. First, and contrary to their representations, when Ajax filed its application on July 12, 1985, they had neither a financial structure, nor an ownership structure. They didn't know who their Board of Directors was. And they hadn't any idea of the stock interest and equity interest each of their principals held. As of September 28, 1986, Robert Francis (Judi Francis' husband) was still an Ajax director. *See* Finding 37 *supra*. and the record shows that Ajax didn't get their ownership and financial structure in order until late April 1988. *See* Finding 18 *supra*.

16. There is a second reason for classifying Ajax's application a "sham." The record more than justifies the conclusion that Sue Ann Todhunter's husband, Glen Gerberg, is an undisclosed principal in Ajax's application. *See* Findings 40-50 *supra*.

17. So even if Ajax weren't disqualified under the false financial certification issue, Aspen FM would win hands down under the standard comparative issue.

ULTIMATE CONCLUSION

18. Under designated Issue 4, we must determine which, if either, of these two mutually-exclusive applications should be granted. Ajax has failed to demonstrate that it is basically qualified to be a Commission licensee, and is thus eliminated from comparative consideration. *See* Conclusions 5-11 *supra*. Thus, no conclusions need to be made under the standard comparative issue, and Aspen FM, Inc., is declared the winner.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews[18] it on its own motion, Aspen FM, Inc.'s application (BPH- 850712PH) IS GRANTED; and Ajax Mountain Broadcasting Corporation's application (BPH-850712PR) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTES

[1] In the interest of uniformity, and so they will harmonize with the way the decision is structured, the issues have been renumbered.

[2] The Mass Media Bureau filed findings of fact on only the comparative coverage aspects.

[3] As of April, 1988.

[4] The Ajax principals arrived at the figure of $683,000 as a result of prepared budget estimates. *See* Aspen FM Ex. 30.

[5] Even Aspen FM's *own* exhibits demonstrate that Steven Hubert is a multi-millionaire. *See* Aspen FM Ex. 42, 43, and 44.

[6] For example, the consulting engineer's supplemental engineering statement, and accompanying affidavit, bear a July 12, 1985 execution date. *See* BPH-850712PR, Ex. E-1B-FM, and Exhibit E-1B-1. This means that Sue Ann Todhunter didn't have that supplemental engineering before her when she signed the application on July 10, 1985.

[7] Nor should the reader be misled into believing that Hubert and Ajax's principals signed ABNI Ex. 33 on September 12, 1985; i.e., the date on the face of that so-called Agreement. The record shows that Ajax's principals were deliberately pre-dating documents in an effort to show that they had a *viable* application in place on July 12, 1985 (the application filing date) and again on September 13, 1985 (the amendment cut-off date). In fact, they had no *viable* application on file on either of those deadlines.

[8] While the terms of the July 9, 1985 Promissory Note didn't pose as many problems as the so-called Memorandum of Agreement *(see* Finding 18 *supra)*, it too had to be revised. *See e.g.* ABNI Ex. 36, Promissory Note dated August 2, 1985, and ABNI. Ex. 37, Promissory Note dated August 6, 1985.

[9] Strangely, just one week earlier (on September 6, 1985), Ajax's Board of Directors had directed its officers to issue: 51 shares of voting stock and 292 shares of non-voting stock to Sue Ann Todhunter; 49 shares of voting stock to Judi Francis; and 588 non-voting shares to Steven Hubert (ABNI Ex. 12).

[10] Todhunter and Gerberg got married in August 1985. Coincidentally Ms. Todhunter increased her equity position in Ajax the next month. *See* Findings 33-35 *supra*.

[11] This approach is consistent with Gerberg's method of operation. In the Frisco proceeding (Findings 40-41 *supra)*. He started out as a consultant, and later became a principal in the applicant (Tr. 1888).

[12] Todhunter claims Gerberg's consulting agreement was purportedly renegotiated at the July 9th meeting with the Hubert group (*See* Findings 15-20 *supra;* Tr. 1530, 1535, 1542, 1546, 1911 1927). Gerberg, who attended the same meeting, says it wasn't (Tr. 1329-1330); however, Gerberg hasn't been billing Ajax every 30 days as agreed upon, and has been paid only his $2,500, and his out-of-pocket expenses. (Tr. 2036; ABNI Ex. 64; ABNI Ex. 65).

[13] But see Findings 39-56 *supra*.

[14] Todhunter presently holds 51% of Ajax's voting (102 shares) and 24.6% of the nonvoting stock. That represents a 30% equity interest.

[15] Francis' 49 shares represent 24.5% of Ajax's voting stock.

[16] Alderfer's 49 voting shares represent 24.5% of Ajax's voting stock.

[17] Note that comparative finding of facts have been made. *See* Findings 26-94 *supra*. It's only comparative conclusions that aren't needed. So if an appellate body disagrees with the false financial certification conclusions, no remand will be required. Stated another way, findings of fact have been made on *all* the issues, and conclusions of law have been made on *all material* issus. *See WFPG, Inc.*, 33 FCC 673 (1962) at para. 13; *Alkima, Broadcasting* Co., 30 FCC 932, 21 RR (1962) at Footnote 7, *Sayer Broadcasting Co.* 32 FCC 496; 22 RR 1059 (1962) at Footnote 7; 47 CFR 1.267(b); and 5 USC 557 (c) (A).

[18] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. *See* 47 CFR 47 1/276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-182

In the Matter of

Amendment of Section 73.202(b),	RM-5543
Table of Allotments,	RM-6096
FM Broadcast Stations.	
(Bear Lake and Grayling,[1]	
Michigan)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 15, 1989; Released: June 5, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 3480 (1987), proposing the substitution of FM Channel 262C2 for Channel 262A at Bear Lake, Michigan, and modification of its construction permit for Station WRQT to specify operation on the new channel. The *Notice* was issued in response to a petition filed by Andrew L. Banas (petitioner). Petitioner filed supporting comments. Ditmer Broadcasting Company, Inc., filed a counterproposal.[2] Petitioner and Ditmer Broadcasting Co., Inc. filed reply comments.

2. In its counterproposal Ditmer Broadcasting Company, Inc. ("Ditmer"), licensee of FM Station WQON, Channel 261A, Grayling, Michigan, requests the allotment of Channel 262C2 to Grayling, rather than to Bear Lake. Ditmer further requests the modification of its license for Station WQON to specify operation on Channel 262C2 in lieu of Channel 261A. In support of its request, Ditmer states the higher class channel would continue to provide service to Grayling but would also provide a new service to a large area outside the community. Ditmer offers Channel 264C2 as a substitute at Bear Lake which would permit allotment of 262C2 at Grayling, accommodating both petitioners' request, for Class C2 facilities.

3. Petitioner objects to the allotment of Channel 264C2 at Bear Lake stating that Ditmer's engineering is incorrect as it used coordinates different than those for the current WRQT tower site. According to petitioner, Channel 264C2 at its specified tower site would be short spaced to Station WBRN, Big Rapids, Michigan. Petitioner argues that the substitution of Channel 262C2 for Channel 261A, an adjacent channel, would scarcely be noticeable to the radio audience but a change to Channel 264C2 would result in a severe disruption of service.

4. In an effort to provide both communities with their desired upgraded service, the staff performed a search to determine if alternate channels were available. However, Channel 262C2 is the only channel which can be allotted to Bear Lake at petitioner's specified tower site, and no other channels are available for Grayling, Michigan. Therefore, our decision will be guided by the allotment priorities as set forth in Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982). These priorities are:

(1) First full-time aural service.

(2) Second full-time aural service.

(3) First local service.

(4) Other public interest matters.

[Co-equal weight given to priorities (2) and (3)]

The allotment of Channel 262C2 to either Bear Lake or Grayling would not provide any first or second aural service or a first local service. Therefore, our decision must be based on priority (4)-Other public interest factors. As detailed in the Appendix, we conducted our own engineering population analysis of the proposals to determine which could provide a new service to the largest population within the gain area of the predicted C2 service contours. *See Greenup, Kentucky and Athens, Ohio*, 2 FCC Rcd 4319 (1987).

5. After considering the results of our analysis and all of the comments filed in this proceeding, we conclude that the Grayling proposal should be adopted. It is clear that both proposals could provide a new service to significant populations within their predicted gain areas. Both proponents have indicated the need for a new service in their area and that they are deserving of an increase in facilities. However, as noted above, both communities cannot have the requested upgrade. We believe our decision based on a comparison of the populations within the predicted gain areas will bring the benefits of a new service to a greater number of people. A comparison of the population totals indicates that the modification proposal at Grayling would service an additional 57,508 people in the gain area, while the proposal at Bear Lake in its gain area would serve an additional 54,319. Therefore, the petition filed by Andrew L. Banas to upgrade on Channel 262C2 at Bear Lake, Michigan, shall be denied. We will allot Channel 262C2 to Grayling, Michigan, and modify the license of Station WQON accordingly.[3]

6. Based on the above information, we believe the public interest will be served by the substitution of Channel 262C2 for Channel 261A at Grayling, Michigan. A staff study has determined that Channel 262C2 can be allotted to Grayling in compliance with the minimum distance separation requirements of the Commission's Rules at the site specified by Ditmer.[4] In addition, we shall modify the license of Station WQON to specify operation on Channel 262C2 in accordance with Section 1.420(g) of the Rules. Canadian concurrence has been obtained for the allotment of Channel 262C2 at Grayling.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 20, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Grayling, Michigan	262C2

8. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WQON, Grayling, Michigan, IS MODIFIED, effective **July 20, 1989,** to specify operation on Channel 262C2 in lieu of Channel 261A subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That the petition filed by Andrew L. Banas (RM-5543) IS DISMISSED.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENIDIX

The following is a summary of the populations of the counties within the predicted gain area of a Class C2 service contour for Station WRQT, Channel 261A, Bear Lake, Michigan. The percentages of increase indicates the predicted increase in coverage by Class C2 facilities over existing Class A coverage in the listed counties.

Michigan Counties	
Manistee (increase from 80% to 100%)	
pop. 23,019 x 20%=	4,604
Benzie (increase from 40% to 100%)	
pop. 11,205 x 60%=	6,723
Leelanua (increase from 0% to 20%)	
pop. 14,007 x 20%=	2,801
*Grand Traverse (increase from 0% to 40%)	
pop. 39,383 x 40%=	15,753
*Wexford (increase from 0% to 60%)	
pop. x 14,903 x 60%=	8,942
Lake (increase from 0% to 30%)	
pop. 7711 x 30%=	2,313
Mason (increase from 0% to 50%)	
pop. 26,365 x 50%=	13,183
total gain in population served	54,319

The following is a summary of the populations of the counties within the predicted gain area of a Class C2 service contour for Station WQON, Channel 261A, Grayling, Michigan. The percentage of increase indicates the predicted increase in coverage by Class C2 facilities over existing Class A coverage in the listed counties.

Michigan Counties	
Crawford (increase from 75% to 100%)	
pop. 9465 x 25%=	2,366
Otsego (increase from 0% to 10%)	
pop. 14,993 x 10%=	1,499
Oscoda (increase from 0% to 25%)	
pop. 6858 x 25%=	1,715
Ogeman (increase from 0% to 30%)	
pop. 16,436 x 30%=	4,931
Gladwin (increase from O% to 15%)	
pop. 19,957 x 15%=	2,994
Clare (increase from 0% to 40%)	
pop. 23,822 x 40%=	9,529
Roscommon (increase from 25% to 100%)	
pop. 16,374 x 75%=	12,281
Missaukee (increase from 5% to 100%)	
pop. 10,009 x 95%=	9,509
Osceola (increase from 0% to 5%)	
pop. 18,928 x 5%=	946
*Wexford (increase from 0% to 5%)	
pop. 14,903 x 5%=	745
Kalkaska (increase from 15% to 90%)	
pop. 10,952 x 75%=	8,214
Antrim (increase from 0% to 5%)	
pop. 16,194 x 5%=	810
*Grand Traverse (increase from 0% to 5%)	
pop. 39,383 x 5%=	1,969
total gain in population in served	57,508

*In Wexford County, population 25,102, Cadillac, population 10,199, is not covered by the C2 upgrade. Its population was first substracted from the total county population before computing the gain in served population for that county.

The same is true for Grand Traverse County, population 54,899, where Traverse City, population 15,516, is not covered by the C2 upgrade.

FOOTNOTES

[1] This community has been added to the caption.

[2] Public Notice of the counterproposal was given on October 2, 1987, Report No. 1683 (RM-6096).

[3] In view of the fact that the Grayling upgrade is substantively preferrable to the Bear Lake upgrade, we need not address the issue of whether the possibility of using Channel 264C2 at Bear Lake weighs against the Bear Lake upgrade. Instead, we have taken petitioner's site and channel preferences as given in our analysis.

[4] The coordinates for Channel 262C2 are 44-28-36 and 84-47-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-567

In re Applications of

GEORGE HENRY CLAY	File No. BPH-870327KB
G. DEAN PEARCE	File No. BPH-870330MY
ALABAMA RADIO MOVEMENT, INC.	File No. BPH-870331ML
JOHNNIE F. KNIGHT	File No. BPH-870414KG
MONTGOMERY BROADCAST PROPERTIES LTD.	File No. BPH-870415KO
JCT BROADCASTING LIMITED PARTNERSHIP	File No. BPH-870415MB
Linda Breland Valeska d/b/a BRELAND BROADCASTING	File No. BPH-870415MI
JUNE N. PHELPS	File No. BPH-870415MM
DOUBLE LS BROADCASTING, INC.	File No. BPH-870415MN
WHITE BROADCASTING NETWORK, INC.	File No. BPH-870415MR

For Construction Permit for a New FM Station on Channel 241A in Montgomery, Alabama

APPEARANCES

Deborah M. Royster on behalf of George Henry Clay; *William E. Kennard* on behalf of G. Dean Pearce; *M. Fred Friedman* on behalf of Alabama Radio Movement, Inc.; *Martin J. Gaynes, Robert M. Gurss, Lonna M. Thompson* on behalf of Johnnie F. Knight; *Eric S. Kravetz* on behalf of Montgomery Broadcast Properties, Ltd.; *David D. Oxenford, Johnathan W. Emord,* and *John K. Hane* on behalf of JCT Broadcasting Limited Partnership; *Stephen T. Yelverton* on behalf of Linda Breland Valeska d/b/a Breland Broadcasting; *Dennis F. Begley* and *Matthew H. McCormick* on behalf of June N. Phelps; *Curtis T. White* on behalf of Double LS Broadcasting, Inc.; *David L. Hill* and *Audrey P. Rasmussen* on behalf of White Broadcasting Network, Inc.; and *Robert A. Zauner* on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
EDWARD J. KUHLMANN

Issued: May 23, 1989; Released: June 5, 1989

1. The ten listed applicants and an additional nine applicants now dismissed were designated for hearing on December 9, 1987. *Hearing Designation Order*, 3 F.C.C. Rcd 41 (1988). The following issues will be considered in this decision:

> 1. To determine whether the proposal of each of the applicants would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and if not, whether circumstances exist which warrant waiver of that section.
>
> 2. To determine whether there is a reasonable possibility that the tower heights and locations proposed by each of the applicants would constitute a hazard to air navigation.
>
> 3. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

2. A prehearing conference was held on March 11, 1988. Hearing sessions to examine the parties' written testimony were held on August 29, 1988 (Tr. 49-251), August 30, 1988 (Tr. 252-533), August 31, 1988 (Tr. 534-763/774), September 1, 1988 (Tr. 775-1058/1119), September 2, 1988 (Tr. 1120-1365/1374); and September 6, 1988 (Tr. 1375-1392). The record was closed on September 6, 1988. Tr. 1389. Proposed findings and conclusions were filed by all applicants on October 25, 1988 and replies were filed by all applicants and the Mass Media Bureau on November 29, 1988.

FINDINGS OF FACT

Issue 1. Whether the proposal of each of the applicants would provide coverage of Montgomery, Alabama as required by Section 73.315(a) and, if not, whether circumstances exist which warrant waiver of the coverage requirements.

3. The parties prepared a joint engineering exhibit which compares the coverage of the applicants as follows (Jt. Engineering Exhibit, Appendix A):

APPLICANT	% OF COVERAGE OF AREA OF MONTGOMERY	% OF COVERAGE OF POPULATION
Clay	69.7	83.3
Pearce	69.7	83.3
Knight	67.3	83.6
Properties	67.3	83.6
Double	67.3	83.6
White	63.1	78.6
Phelps	63.1	78.6
Breland	63.1	78.6
JCT	54.4	70.6
Movement	54.1	70.6

Issue 2. Comparison of the applicants' proposals.

Diversification of control of the media of mass communications

4. *George H. Clay* currently owns 55% of the stock of All Channel TV Services, Inc. and New World Communications, Inc., licensees of WBIL(AM) and WBIL-FM at Tuskegee, Alabama. Clay Exh. 1, at 5. Mr. Clay is president and chairman of the board of directors of both companies and general manager of the stations. Clay Exh. 1, at 2, 5. Clay has promised to divest his ownership and employment relationship with the stations if his application is granted. Clay Exh. 1, at 5.

5. *G. Dean Pearce* is currently employed as general sales manager at stations WTUG-FM and WTSK(AM), Tuscaloosa, Alabama; he has promised to resign his position if his application is granted. Pearce Exh. 1, at 1.

6. *Movement* has no mass media interests, nor do its principals. Movement Exh. 2, at 1.

7. *Johnnie F. Knight* has no mass media interests. Knight Exh. 3. He is the general manager of WVAS-FM, Montgomery, Alabama but he will resign from that position if his application is granted. Knight Exh. 2, at 4.

8. *Properties*' general partner, Allan G. Stroh, is employed at WHHY AM/FM, Montgomery, Alabama as a salesperson; he will resign that position if a grant is made to Properties. Properties Exh. 3, at 1. June M. Collier-Mason, who owns 30% of Properties' equity as a limited partner, owns an 8.25% limited partnership interest in Channel 17 Associates, Ltd., licensee of WDBB-TV, Tuscaloosa, Alabama. *Id.* Ben C. Collier owns a 9.35% interest in the Channel 17 Associates as a limited partner and Carl Barranco, at the time Properties' application was filed, owned a .12% interest in Channel 17 Associates as a general partner. *Id.* Both Barranco and Collier are limited partners in Properties and they hold 20% and 30%, respectively, of Properties' equity. Properties Exh. 1, at 1.

9. Mr. Stroh filed an application as an individual for a new FM station at Talladega, Alabama under the first come first served filing system, and his was the first filed application, Properties Exh. 3, at 1; Tr. 1321-22. Although he expects to be granted, he intends to sell the permit at a fair market value if Properties receives a grant. Tr. 1322. If this proceeding is still pending when he must construct the Talladega facility, Mr. Stroh will construct the facility and operate it from Montgomery. Tr. 1325.

10. *JCT* is a limited partnership. Janet May, JCT's general partner, is majority owner of Thomas-May Associates, Inc., which has served as an advertising agency but presently only does graphics. JCT Exh. 2, at 5; Tr. 630-632. May will terminate her employment with Thomas-May Associates, Inc. if a grant is made and if the agency continues in business, she said it will not perform services for broadcast stations or place advertising on broadcast stations. JCT Exh. 2, at 5. JCT limited partner H. Hunter White, III is a voting and probably controlling owner of Belle Chasse Broadcasting Corporation, which will hold a construction permit for an FM Channel at Belle Chasse, Louisiana. White owns 36.5% of the votes in an entity that will have 51% of the equity in the winner and an outright 24.5% interest in the permittee. White will have 19.125% equity interest over all. *Petition for Leave to Amend*, filed April 28, 1989 by JCT Broadcasting Limited Partnership; *Further Statement for the Record*, filed May 10, 1989 by JCT Broadcasting Limited Partnership.

11. *Breland* is an individual applicant, Linda Breland Valeska; she has no mass media interests. Breland Exh. 8.

12. *June N. Phelps* is an individual applicant. Currently, Phelps works for George H. Buck, who owns numerous broadcast stations. Phelps is general manager of WMGY(AM), Montgomery, Alabama and she is Vice President of WMGY Radio, Inc., the licensee of WMGY. Phelps Exh. 1, at 2, 6. She will resign from both positions, if she receives a grant. Phelps Exh. 1, at 6. Phelps is also vice president of WCOS, Inc., licensee of WCOS(AM) and WCOS-FM, Columbia, South Carolina, Muscogee Broadcasting Company, licensee of WEAM(AM), Columbus, Georgia, GHB Broadcasting, Inc., licensee of WYZE(AM), Atlanta, Georgia, WHVN, Inc., licensee of WHVN(AM), Charlotte, North Carolina, WNAP, Inc., licensee of WNAP(AM), Norristown, Pennsylvania, and Asheville Broadcasting, Inc., licensee of WTOO(AM), Asheville, North Carolina. *Id.*

13. Phelps has worked for George Buck, who owns these stations, since 1978 and she currently spends 20 hours a week on the activities of his stations, excluding WMGY, Montgomery. Tr. 809-810, 839. Phelps supervises the stations in all respects with the exception of WCOS-FM Columbia, South Carolina and WTOO(AM), Asheville, North Carolina. Tr. 807-09. She oversees their financial operations, makes decisions involving those operations, and directs the accounting system. Tr. 805, 841. She also visits the stations to review their performance. Tr. 834. Phelps prepares monthly statements on each station for Buck. Tr. 811-12. She reviews her reports with Buck each Monday and sometimes evaluates employee performance. Tr. 845-46. She is paid for this service. Tr. 807-09. She was given responsibility for the stations because she helps Buck make decisions. Tr. 805. He is blind and lives in New Orleans. *Id.* Phelps has stated that she will reduce these activities to 4-5 hours per week. Tr. 809-10; Phelps Exh. 1, at 6. She will continue to analyze financial data for the stations for Buck in order that he can make business decisions involving them. Tr. 842, 811-12. She will continue to monitor the performance of the managers of the stations for Buck. Tr. 843-44. Her monthly reports will still make recommendations. Tr. 844. But she believes that she will speak with Buck once a month, not every week, as she now does. Tr. 846. She represents that she will not oversee all the other stations after a grant is made. Tr. 846. She will still be paid. Tr. 809. Phelps claims that she will not oversee the monthly statements for station WMGY, Montgomery. Tr. 812-13.

14. Phelps did not introduce the following facts at the hearing; she requests that notice be taken: WCOS(AM), Columbia, South Carolina, operates on 1400 kHz with daytime power of 1 kw and a nighttime power of 250 watts. WCOS-FM operates with 100 kw at an antenna height 300 meters above average terrain. Columbia is

approximately 324 miles from Montgomery. Columbia has 7 FM stations, 6 AM stations and 4 television stations. Columbia also has a daily and Sunday newspaper. WEAM(AM) Columbus, Georgia operates on 1580 kHz daytime only with power of 2.3 kw. Columbus is approximately 77 miles from Montgomery and is the city of license of 8 FM stations, 6 AM stations and 5 television stations. It has a daily and Sunday newspaper.

15. WYZE(AM), Atlanta, Georgia operates on 1480 kHz daytime only with a power of 5 kw. Atlanta is approximately 146 miles from Montgomery and has 9 FM stations, 12 AM stations, and 11 television stations. Atlanta has one paper published seven days a week, one published every day but Wednesday and one published weekly. WHVN(AM), Charlotte, North Carolina operates on 1280 kHz with 5 kw daytime and 500 watts nighttime. Charlotte is approximately 370 miles from Montgomery. Charlotte has 6 FM, 8 AM, and 6 television stations. It has one daily and Sunday newspaper.

16. WTOO(AM), Asheville, North Carolina, operates on 1380 kHz with 5 kw daytime and 1 kw nighttime power. Asheville is 309 miles from Montgomery and is the city of license of 4 FM, 5 AM and 4 television stations. There is one daily and Sunday newspaper. WNAP(AM), Norristown, Pennsylvania, operates on 1110 kHz with 4.8 kw daytime only. Norristown has a daily newspaper and no other broadcast facilities. It is considered part of the Philadelphia Arbitron radio market with 37 stations.

17. *Double* and its principals have no ownership interest in the media of mass communications. Double Exh. 2, at 1. Tracy Larkin performs on-air activities for WXVI(AM), Montgomery and he is anchor/host of a program on Alabama Public Television, which is networked to nine Alabama television stations. Double Exh. 2, at 1; Tr. 928-29. In his written testimony he said he would sever these relationships if Double receives a grant. Double Exh. 2, at 1; Exh. 3, at 6. During his oral testimony Larkin said he would end his programming relationship with Alabama Public Television only if it interferes with his commitment to this proposal. Tr. 919. He was asked if his answer was different from his written testimony. His response was that the promises were the same. Tr. 920. Mr. Larkin has a 33.39% voting interest in Double. Double Exh. 1. Tommy Simon, who owns a 33.32% interest in Double, does programming, announcing, and sales for WMGY(AM), Montgomery. Double Exh. 1, at 1 and Exh. 4, at 2. He will end his employment if Double is awarded the permit. Double Exh. 4, at 4.

18. *White* and its owners have no mass media ownership interests. White Exh. 1, at 4 and Exh. 3, at 3. William White, Jr., who is a 60% shareholder, currently is the general manager of WAPZ, Wetumpka, Alabama. White Exh. 1, at 5. He will end his association with the station and the licensee, J & W Promotion, Inc., if a grant is received. *Id.*

Full - time participation in station operation by owners

19. *Clay* is an individual applicant and he proposes to work 40 hours per week, full time, as the general manager of the station. Clay Exh. 1, at 1. He will establish and implement station policies and operating procedures, prepare budgets, oversee all departments, and maintain relationships with the community. *Id.* Clay has spent 20 hours per week, since 1973, working on the business of Clay & Associates, an insurance agency. Clay Exh. 1, at 5. He intends to continue working on the agency's business, unless he finds that it interferes with the station's operations. *Id.* Clay will hire a manager to supervise the day-to-day affairs of the insurance agency. Clay Exh. 1, at 5; Tr. 91-92. Clay manages his two Tuskegee, Alabama stations and the insurance business simultaneously. Tr. 90. The insurance agency paid Clay dividends of $90,000, in 1987, and commissions of $40,000. Tr. 87, 90. Clay also receives the use of a Lincoln-Continental and reimbursement for certain business expenses. Tr. 88. The business is located in the same building as the Tuskegee stations. Tr. 90-91.

20. Clay lives in Tuskegee but he will move to Montgomery, if his application is granted. Clay Exh. 1, at 1; Tr. 73. While Clay does not live within the service area, for the last five years he has spent two hours per month as a board member of the Southeast Alabama Self Help Association Revolving Loan Fund, which lends money to minority businesses in a nine-county area that includes Montgomery. Clay Exh. 1, at 3; Tr. 95-7. From April 1984 to June 1987, Clay was a director of the Alabama State Health Planning Agency, which meets monthly in Montgomery and licenses hospital beds and major equipment purchases for hospitals throughout the state. Clay Exh. 1, at 3-4; Tr. 92-4. Clay has been the general manager of WBIL(AM), since August 1973, and WBIL-FM, since April 1978. Clay Exh. 1, at 2. He represents that he works full time at the stations. *Id.* Clay is black. Clay Exh. 1, at 1.

21. *Pearce* is an individual applicant. Pearce Exh. 1, at 1. He will work full time, 40 hours per week, as the general manager. *Id.* He will be responsible for all station operations, including establishing station policies, hiring and supervision. *Id.* Pearce is currently sales manager at WTSK(AM) and WTUG-FM, Tuscaloosa, Alabama; he intends to be involved in sales at the proposed Montgomery facility, which he believes will take 40% of his time at the station. Tr. 125-26. In response to questions from his own counsel about whether he would be acting in that capacity as sales manager, Pearce took the lead provided by counsel and agreed he would undertake the duties of a general sales manager. Tr. 130. Pearce does not live in Montgomery, but he has promised to move there. Pearce Exh. 1, at 1.

22. Pearce has been a salesperson at the Tuscaloosa stations since March 1985 and sales manager since April 1987. Pearce Exh. 1, at 1-2. From 1976 to 1980, at various times, he worked at WARF(AM), Jasper, Alabama. Pearce Exh. 1, at 2. He did odd jobs, such as cleaning, helping build a tower, and moving equipment. Tr. 120. Pearce will end his employment with the Tuscaloosa stations. Pearce Exh. 1, at 1; Tr. 111.

23. *Movement* is a non-stock, not-for-profit corporation organized on April 29, 1988 in the District of Columbia. Movement Exh. 1, at 1. Movement is governed by five directors, each of whom has one vote. *Id.* None of the members of the board will work at the station on a day-to-day basis. Movement Exh. 3, at 2-3. Movement will employ two managers to run the staff, although the board will set policy. Movement Exh. 1, at 1-2. The directors will serve for three years. Tr. 225.

24. The directors have not been involved in establishing the applicant. The Affiliated Media Foundation Movement has undertaken that task. The Affiliated Media Foundation Movement located the directors (Tr. 163) and prepared the incorporation papers (Tr. 212-13, 217-18),

bylaws (Tr. 217), and FCC application (Tr. 171-73). The Affiliated Media Foundation lent Movement money to prosecute its application (Tr. 201-02), gave Movement a letter of financial commitment (Tr. 192-93; Pearce Exh. 5), recommended that Citizens Consulting, Incorporated handle its accounting (Tr. 182), chose its president (Tr. 223), handled public notices for Movement (Tr. 241-42), and signed an agreement with Movement to provide services, including recruiting, training personnel, and purchasing equipment and land for the proposed station. Pearce Exh. 4; Tr. 186.

25. Although the directors will not work at the station, three of them, Cora McHaney, Valtoria J. Garnier, and Paola Maranan, live in Montgomery. Movement Exh. 4, at 1; Exh. 5, at 1; Exh. 6, at 1. Maranan has lived there for four years, McHaney all her life, and Garnier all her life. They have all been involved in civic activities. Movement Exh. 4, at 2-3; Exh. 5, at 1-3; and Exh. 6 at 2-3. All of them are black and female. *Id.*

26. *Knight* is an individual applicant. Knight Exh. 1. Knight proposes to work full time, 40 hours per week, as the general manager of the proposed station. Knight Exh. 2. His duties will include overall responsibility for station operations and management of all policy. *Id.* Knight has lived in Montgomery all of his life, 43 years. *Id.* He has been, and is, active in local civic activities. Since 1980, he has been a member of the Montgomery County Commission, a part-time paid position which has weekly two hour meetings. Knight Exh. 2, at 2-3; Tr. 367, 400. Since 1986, he has belonged to the Alabama Democratic Conference. Knight Exh. 2, at 1. He is an officer and attends a 2-3 hour meeting each quarter. Tr. 419. Knight belongs to the Montgomery County Democratic Conference. He is chair of the conference and attends a meeting once a month for 1 1/2 hours. Knight Exh. 2, at 1; Tr. 371. Knight belongs to the County and State Democratic Party and is on their executive committees. Meetings of the state party are held twice a year and require 2-3 hours. Tr. 422. Knight is on the board and building fund-raising committee for the Cleveland Avenue YMCA. Knight Exh. 2, at 2. This activity takes three to four hours per month. Tr. 372-73. Knight belongs to the boards of the Montgomery Housing Authority, Montgomery Improvement Association, and the Carver Center for Creative and Performing Arts. Knight Exh. 2, at 2. He attends monthly board meetings of these organizations. Knight belongs to the Cosmopolitan Civic Club, Alabama Press Association, Association of County Commissioners, Central Alabama Regional Planning Board, Montgomery Chamber of Commerce, Coosa Alabama River Improvement Authority, National Association of County Commissioners, National Association of Black County Officials, and the National Association for Equal Opportunity in Higher Education. Knight Exh. 2, at 3. He attends between one and three meetings per year of each of these organizations. Tr. 384, 377-78, 424, 378-79, 379-80, 425, 380-81, 427, 382, 428. He belongs to a local church and has participated in many other local activities. Knight Exh. 2, at 2-4. Knight stated that he would stop some of these activities if it were necessary in order to spend time at the station. Tr. 377.

27. Knight is Director of Communications and Public Affairs for Alabama State University in Montgomery. He spends 40-50 hours per week on his job. Tr. 408. As part of that job Knight works at WVAS-FM 20-30 hours per week. Ten of those hours involve announcing or producing sports programming for the ASU Sports Network. Knight Exh. 2, at 4; Tr. 386-87, 415-16. He is general manager of the station and has been since 1984. Knight Exh. 2, at 4. From 1976 to 1980, he announced sporting contests on the Alabama State University Sports Network. *Id.* Knight will leave his position at WVAS if a grant is made. *Id.* Knight believes he will spend about 3 hours per day more at the proposed facility than he did at WVAS because he will oversee sales. Tr. 388-90. Knight testified that he would be able to devote more time to the running of this station because he will not have the added duties he now has. Tr. 389. Knight is black.

28. *Properties* is a limited partnership with one general partner, Allen G. Stroh, who owns a 20% equity interest, and three limited partners, Carl Barranco, who owns a 20% equity interest, Ben C. Collier, who owns a 30% equity interest, and June M. Collier-Mason, who owns a 30% equity interest. Properties Exh. 1. After the close of the record, on September 30, 1988, Ben C. Collier was replaced as a limited partner by B. Stephen Schloss. *Memorandum Opinion and Order*, FCC 88M-4149, released December 6, 1988, at 9.

29. Allen Stroh proposes to work full time, 40 hours per week, as general manager at the proposed station. Properties Exh. 2, at 1. Stroh will be responsible for supervising the overall operation of the station, including sales, programming, promotion and administration. Stroh, who is an existing broadcast employee, asked his friend, Carl Barranco, to help him locate financial backers. Tr. 1276-77. Barranco suggested Collier and Collier-Mason, for whom Barranco serves as an accountant and financial advisor. Tr. 1280-82. Barranco has been financial advisor to Collier and Collier-Mason for twenty years. Tr. 1282. He has put together seven or eight transactions for them. Tr. 1378.

30. Barranco received his 20% interest, the same amount held by Stroh, for putting together the partnership and monitoring the investment for the other limited partners. Tr. 1299. Stroh and Barranco meet on a regular basis to discuss a variety of matters, including Properties' application, and will continue to do so in the event Properties is awarded a construction permit. Tr. 1309-10. Before Barranco enlisted his clients' backing, Stroh provided an analysis of the likely costs and projected revenues to demonstrate that the project would be a prudent investment. Tr. 1280-81, 1302, 1336. Barranco reviewed Stroh's analysis and then agreed to provide financial backers. Tr. 1281, 1336. Stroh will manage the station on a full-time basis but Barranco will monitor the financial performance. Tr. 1335-36, 1355. Properties established a limited partnership in order to meet Commission requirements. The agreement was executed on March 27, 1987 and recorded in the Montgomery County Judge of Probate's office on April 14, 1987. Properties Exh. 1, at 1. The partnership agreement provides that Stroh has the exclusive right to manage the business of the partnership and that the limited partners have no right to directly or indirectly participate in the control, management, or operations of the business. Properties Exh. 1, at 3 (§2.1), and 6 (§3.2); Tr. 1283. Section 3.3 of the partnership agreement provides that no limited partner is liable for the partnership debts beyond the amount of capital the partner has agreed to contribute. Properties Exh. 1, at 1, Agreement, at 7. Stroh believes that the limited partners are not obligated to pay money to the partnership in excess of their initial capital contributions. Tr. 1294.

31. Section 5.2 of Properties' agreement provides for initial capital contributions of $2,750 by Stroh, $5,500 by Collier, $5,500 by Collier-Mason, and nothing by Barranco. Properties Exh. 1, Agreement, at 9. Stroh has contributed the funds called for in the partnership agreement and he believes he has no additional obligation to contribute. Tr. 1306. Stroh believes he has an obligation to render services while Collier and Collier-Mason will be responsible for paying costs. Tr. 1293. The partnership agreement provides that the partners will have to make additional capital contributions as follows: Stroh, $1,250, Collier, $2,500 and Collier-Mason, $2,500. Properties Exh. 1, Agreement at 9-10.

32. Barranco, Collier, and Collier-Mason are investors in the licensee of WDBB-TV, Tuscaloosa, Alabama. Tr. 1350. Barranco was a general partner. Tr. 1349-50. Stroh told Barranco that they would need a communications lawyer and engineer. Tr. 1282. Barranco initially contacted the lawyer who represented WDBB-TV but because he had a conflict, Barranco contacted the counsel Properties hired. Tr. 1283. Barranco told counsel that Stroh would run the station and counsel suggested organizing the applicant as a limited partnership. Tr. 1286. Counsel, Eric Kravetz, recommended that Barranco, Collier and Collier-Mason would become limited partners and Stroh the general partner. Tr. 1287. Kravetz gave Stroh a list of engineers and Stroh selected one. Tr. 1321. Kravetz and Stroh's local counsel, Ed Azar, prepared the partnership agreement. Tr. 1315. Stroh made no changes in the draft they prepared. Tr. 1316. Stroh has never been in a limited partnership before. Tr. 1320. Stroh represented that he negotiated his interest. He claimed that he first sought a 25% interest but Barranco testified that he recalls Stroh accepting the first amount suggested. *Compare* Tr. 1288 and 1388. Aside from the capital contributions, Collier and Collier-Mason have guaranteed proposed loans from the bank. Tr. 1308. Stroh obtained the bank letter. *Id.*

33. Stroh currently attends to the few needs the partnership has. When funds are needed he tells Barranco who obtains the money from the limited partners. Tr. 1293-94.

34. Stroh has lived in Montgomery since 1964. Properties Exh. 2, at 1. He belongs to a church; from 1985 to 1986 he was a volunteer for the Jackson Hospital Community Challenge and from 1978 to 1987 he participated in the East Montgomery Exchange. Properties Exh. 2, at 1-2. In addition, Stroh has participated in a wide variety of community civic activities. *Id.* From summer 1973 to 1974, summer 1974 to 1976 and from 1976 to the present, Stroh has worked full time at broadcast stations. He is now a general sales manager and supervises six people. Properties Exh. 2, at 2-3. He will resign from his current position, if Properties receives a grant. Properties Exh. 3, at 1.

35. *JCT* is a limited partnership organized under the laws of Alabama. JCT Exh. 1, at 1. Janet May is the only general partner and H. Hunter White, III and his brother, Michael White, are the limited partners. JCT Exh. 1, at 1. The equity in the partnership was intended to be divided 50-50, with the Whites holding 50% and Janet May 50%. *Id.* The partnership agreement provides that the profits from the operation or sale of the partnership will be distributed in proportion to the equity held by each partner at the time of distribution. JCT Exh. 1, Attached Agreement, at Art. 6.2, 13.2; Tr. 555. If one partner contributes more than her or his pro rata share of capital in the partnership in order to meet the costs of prosecuting the application, the other partners' equity will be diluted accordingly. Tr. 531-32, 663-64. Janet May is in poor financial condition. She deposited her share of the first capital call and then withdrew it. Tr. 663, 664. (This was not the only business transaction in which May purportedly paid or set aside money for one purpose and then when other needs arose she used it for something else. She hired two people to help her at her advertising agency and withheld federal taxes from their paychecks to pay to the government and used the money for something else. Tr. 595-97. This action resulted in a tax lien for $7,405.71 by the IRS on February 18, 1987. Tr. 595-96.) Hunter White lent her the next amount that was due, $3,000, in order that she could pay her share of the $6,000 filing fee. Tr. 663-64, 694, 705-06. The partnership has outstanding bills of $25,000 and White believes that expenses will be close to $100,000 (Tr. 662, 663); he said he did not know if May could pay her share.

36. May cannot meet JCT's current obligations out of existing funds. Tr. 547. May believes her personal share of the expenses will be $30,000 and she does not plan on providing any more money than that if more is needed. Tr. 540, 547. She is unable to meet her current obligations. Tr. 547. Thomas May & Associates, an advertising agency she owns, and May have been subjected to lawsuits and liens by lending institutions, a realty company, product and service suppliers and the state and federal governments. She removed her office to her home and has settled claims which led to a scheduled sheriff's sale of her home. Properties Exh. 5, Exh. 6; Tr. 576-79, 583-86, 589-93, 595-96, 601-03. Because she knew she could not provide the money for her share, May asked others if they would help her - - on the assumption that they would take part of her interest -- but the people she talked with were only willing to contribute if they could control a "majority share of the whole partnership." Tr. 612-15. May explained that she is aware that her equity in the partnership could be diluted below 50% when JCT's outstanding bills are satisfied and that she may end up with as little as a 1% interest. Tr. 541. She currently has debts of about $50,000. Tr. 627.

37. Initially, there was one other partner in JCT, Gloria E. Gavarrette, a former employee of the Whites. JCT Exh. 1, at 1. She held a 3.33% equity interest. Hunter White gave Gavarrette her interest and when she left his employment he took back her interest. JCT Exh. 1, at 1, and Attached Agreement, at 1 and Exhibit A. Tr. 510, 553-55. White told May about Gavarrette's interest months after it no longer existed. Tr. 553-54, 704-05. Hunter White made the decision to give Gavarette her interest.

38. It was Hunter White who first became interested in the Montgomery frequency. White, who lives near New Orleans became interested when he sent for a brochure that was advertised in the *Wall Street Journal*. Tr. 635-36. The brochure listed new FM frequencies allotted by the Commission and explained that prices for FM stations had been escalating. *Id.* The brochure explained that the Commission preferred local residents, minorities, women, and persons with broadcast experience. White had been a member of groups that had entered the cellular lottery proceedings and those groups obtained and sold the authorizations in six different markets. Without ever operating them, he received a $300,000 return on his $20,000 investment. Tr. 635-41.

39. White selected ten markets, including Montgomery, which appeared to have good potential. Tr. 642-44, 646. He mentioned his interest in the Montgomery facility to his banker, who called a friend in Montgomery, who, in turn, found Janet May for White. Tr. 647. Initially, White talked with May for 30 minutes by telephone and they then met in Mobile for two hours where they discussed applying for the license in the course of a social discussion. Tr. 504, 508-09, 647-60. Their discussion about broadcasting dealt with what the Commission was looking for in an applicant, not about running a station or the costs of building one. Tr. 507-08. White and May met again in Washington, D. C., where they had gone to select a law firm. They considered two which White had previously used. Tr. 515-16, 521, 652.

40. When they decided to proceed, White believed their chances were good because May lives in Montgomery, is a minority female and has worked at a broadcast station. Tr. 520. White has only thought about how much it will cost to obtain the permit; he has no idea how much it might cost to build or operate the facility, or how the station might operate after it is licensed. Tr. 511, 655-56, 666-67. Counsel advised them to organize as a limited partnership with May being the general partner and the Whites the limited partners, and to divide the equity. Tr. 529, 651, 656. White never determined whether May could contribute her share, never checked with her broadcast employers, and never looked at the business or financial records of Thomas May & Associates, the advertising agency May owns and manages. Tr. 651, 656. He never discussed with May the proposed budget or business plans and he does not know if there is one. Tr. 666-67. White only learned of May's advertising agency after the application was filed. Tr. 659. White does not know the terms or amount of the loan specified in JCT's bank letter or whether it calls for his personal guarantee. Tr. 667-69. May represented that White's guarantee was required and that White had agreed to provide it. Tr. 550-51, 573.

41. White believes that a strong sales background is most suitable for a radio station manager if the business is to succeed. And when he chose a manager for his SMRS franchise in Boston, he selected someone with a background in finance. However, when he picked May he did not because he believes the value of an FM facility inheres in its license, regardless of its management. Tr. 696. 714-16. White now knows that May's financial status and that of her business are "not great." Tr. 660-61.

42. White is a limited partner in three other FM broadcast applications, Long Beach, Mississippi, Brusly, Louisiana, and Belle Chasse, Louisiana, where he also sought out strangers to be general partners.[1] They were selected to meet Commission preferred criteria and not in consideration of their business acumen. Tr. 646-48, 670- 71, 674-76, 679-81, 696.

43. After the partnership was organized, May located the transmitter site, obtained a bank letter, reviewed drafts of the Form 301 prepared by counsel, and discussed the case with counsel. JCT Exh. 1, at 3. She has promised to work full time, 40 hours per week, as the general manager. JCT Exh. 2, at 1. May will be responsible for supervising all station employees and overseeing all operations of the station. JCT Exh. 2, at 1. She will leave her advertising agency and will either stop that business or hire someone to run it. *Id.*

44. May has lived in Montgomery since 1976 and she has been active throughout that time in civic activities. JCT Exh. 2, at 2-4. She is black and female. JCT Exh. 2, at 1. From March 1975 to December 1975, January 1977 to August 1977, May 1978 to March 1979, March 1979 to March 1982, she worked at broadcast stations as, respectively, an announcer, public affairs director, news reporter, and public affairs director. JCT Exh. 2, at 4-5.

45. *Breland* is an individual applicant. Breland Exh. 1. Breland proposes to work full time, 40 hours per week, as general manager of the facility. Breland Exh. 2. She will set general policy for the station, hire and fire employees. She will quit her job as general counsel of the Alabama Forestry Commission. *Id.* Breland lived in Montgomery from May 1975 to August 1975, from July 1976 to May 1984, and from September 1986 to the present. Breland Exh. 3. Breland belongs to a local church and aside from professional organizations, she belongs to the Mental Health Association and the League of Women Voters. Breland Exh. 4. Breland is female. Breland Exh. 5.

46. *Phelps* is an individual applicant. She proposes to work full time, 40 hours per week, as general manager of the proposed station. Phelps Exh. 1, at 1. She will have overall managerial responsibility for and authority over all aspects of the station's operations. *Id.* Phelps has lived in Montgomery all of her life except for eight years (1939-1946 and 1950-51), since 1923. *Id.* She has actively participated in community activities, including the Women's Christian Association, the Montgomery Refuge Center and the Abuse Center, Alabama Shakespearian Festival, a local church, and various other organizations; she has been active in the civic life of Montgomery since 1950. Phelps Exh. 1, at 2-3. She has been a local broadcaster since 1961 and in 1974 she became general manager of WMGY. Phelps Exh. 1, at 2. Phelps is female. Phelps Exh. 1, at 1.

47. *Double* is a corporation organized in Alabama on May 31, 1984. Double Exh. 1. Currently the shares are held by Hilton L. (Tracy) Larkin, who holds 1,000 shares representing 33.39% of the shares, Tommy Simon, who holds 998 shares representing 33.32% of the shares, and Loretta Simon, who holds 997 shares representing 33.29% of the shares. *Id.* Tracy Larkin is president and a director, and Loretta Simon is secretary/treasurer and a director. *Id.*

48. Double has had two sets of articles of incorporation. In both the original and the restated versions it was provided that the owners would work together as a "limited partnership" to develop and own broadcast stations in Alabama. Phelps Exh. 4, at 1; Tr. 873. Larkin said he knew that the articles provided for acting as a limited partnership but he said it was not the intention of Double to do so. Tr. 871-73. On the other hand Larkin said the owners had not taken any steps to change the articles. *Id.* In May 1984, Double's corporate documents indicated that Larkin held 499 shares, Tommy Simon held 499 shares and Loretta Simon two shares, but no stock certificates were issued. Tr. 868. When Double restated its articles in December 1985 the shares were increased from 1,000 to 3,000 and Norman Lumpkin became a stockholder. Phelps Exh. 4, at 1; Tr. 869. Lumpkin is a broadcaster and he was going to be involved in the application. Tr. 892, 914. Lumpkin and Larkin were to each hold 33.33% of the shares according to November 25, 1985 minutes of the corporation, and Tommy Simon 33% and Loretta Simon .33%. Phelps Exh. 5, at 2. It was then

decided that the three men would be integrated on a part-time or full-time basis, but not Loretta Simon. Phelps Exh. 5, at 3; Tr. 876.

49. At the November 25, 1985 meeting, a resolution was adopted which stated that the shares had been paid for and should be issued. Phelps Exh. 5, at 4. The minutes are inaccurate because the stock had not been paid for. No shares were issued until July 11, 1987. Tr. 868, 878. Double filed its application on April 15, 1987, two weeks previous, on April 2, 1987, the board accepted Lumpkin's resignation and Lumpkin agreed to return his shares, which had not been paid for. The minutes reflect that Loretta Simon would be issued subscription rights for 995 shares and that the board requested that she immediately subscribe to the shares. Phelps Exh. 6, at 4. According to the minutes, those shares issued to Tommy Simon and Larkin were paid for with services and labor performed. *Id.* Although the minutes indicate that Loretta Simon was required to sign a valid subscription agreement, she never did. Phelps Exh. 7; Tr. 882. She was issued a stock certificate for her shares in July 1987 but she and her spouse, Tommy Simon, could not pay for the stock because they had no money. Tr. 956-57. On December 1, 1987, she paid $997 for her stock, in lieu of signing a subscription agreement. Phelps Exh. 7. At the April 2, 1987 meeting Double also revised its integration proposal. Phelps Exh. 6, at 6. No final determination was made about whether the principals would be full time at the station. *Id.*

50. Although Loretta Simon is to become business manager of the facility, she did not participate in business matters involving the application. Tr. 908, 902, 916, 907. She was not consulted about the budget, equipment, etc. Tr. 946, 953. Tommy Simon said she did not know anything about equipment. Tr. 953. Although she is treasurer and secretary, she has no responsibility for responding to questions from the Commission. Tr. 864, 938. She has no responsibility for keeping the application up to date. Tr. 1008. Larkin and Tommy Simon decide when money is needed to pay bills. Tr. 1004. Loretta Simon is not even aware of the amounts of such expenditures by Double to date. She believes that each principal has contributed $10,000 (Tr. 1004) but both Tommy Simon and Larkin testified that each principal had contributed $20,000. Tr. 884-85, 958.

51. Larkin proposes to work full time, 40 hours per week, as the station's general manager. Double Exh. 3, at 6. He will supervise all aspects of the station operation and personnel according to policies set by the board. *Id.* He stated that he "will terminate his employment at the Alabama Public Television and WXVI(AM)" where he is employed as an early morning staff announcer. Exh. 3, at 4, 6. He recanted part of that promise on cross-examination and said that he would quit his position with Alabama Public Television (where he is a technical consultant for two and a half hours each day) only if it interfered with his work at the Double facility. Tr. 919. Larkin said he currently holds another rfull-time job and still works for the public television station. Tr. 919-20.

52. Since 1985, Larkin has operated an advertising and public relations company, Tracy Larkin Company. He is the president; in his written testimony he said he would resign and "withdraw from the company." Double Exh. 3, at 5-6. When he was asked during discovery whether he would give up the work of his agency, he did not indicate that he would. Tr. 894-95. He now receives 67% of his income from the agency. Tr. 923. The company does not place advertising in the local media currently but Larkin said it may in the future. Tr. 916. He said that he would act as a consultant to the agency. *Id.*

53. Larkin has lived in Montgomery since he was born in 1946, except when he went to the University of Pittsburgh. Double Exh. 3, at 1. He has participated in local activities since 1978. He is on the board of the Montgomery World Heritage Museum; he was a member of the advisory board of the Montgomery/Tuskegee Times; he belongs to the United Minority Business Association; he is chairman of a committee of the Rosa Parks Compendium; he belongs to the Citizens Advisory Council of the Alabama Department of Human Resources; and he belongs to various professional organizations. Double Exh. 3, at 4-5. Larkin also has worked at broadcast stations since 1966 when he began working on weekends for WRMA(AM) radio in Montgomery. *Id.*, at 2. He has worked, apparently continuously, since then at broadcast stations, most often in the position of program manager. *Id.* Larkin states that sometime after 1969, he went to the University of Pittsburgh where he worked on a degree and was a teaching assistant; he represents that he received a degree from the University of Pittsburgh. At the same time he claims to have been employed at Station WRMA in Montgomery where he "supervised the announcing staff, served as a host of a telephone-audience participation program." He represents that he was doing this in 1970 to 1972 and 1966 to 1969. Double Exh. 3, at 2. Larkin is black.

54. Tommy Simon proposes to work 40 hours per week as operations manager. Double Exh. 4, at 3-4. He will supervise programming, engineering, promotions, personnel and report to the general manager for directions. Double Exh. 4, at 4. He will quit his position at WMGY(AM) if Double receives a grant. *Id.* Since 1980, Simon has worked for Aronov Realty where he was a senior sales executive at the time of the hearing. Double Exh. 4, at 2-3. He has not decided whether he will continue to work for Aronov Realty if Double receives a grant. Double Exh. 4, at 4. Simon did not state in answers to interrogatories that he would quit his job with Aronov Realty. Tr. 942-44.[2] According to Double's application, Simon also heads the advertising and promotion firm of Simon and Associates. In its application Double represented that both Simon and Larkin would quit their current employment. Simon lives in Montgomery and has since he was born. He has participated in one local charitable organization and he belongs to the Masons. Double Exh. 4, at 3. Simon has apparently worked at broadcast stations since 1974 in programming and on-air jobs. Double Exh. 4, at 1-2. He does not say whether the positions have been full time. Simon is black.

55. Loretta Simon proposes to work 40 hours per week as business manager of the station. Double Exh. 5, at 3. She will supervise the sales and finance department. *Id.* She states that she will be "involved in" payroll matters, taxes, accounting and bookkeeping and will supervise all employees engaged in those activities. *Id.* When Simon was questioned about which employees she would supervise, she said she was not sure how many there would be but the office manager and the receptionist would be under her. Tr. 1001. But she conceded neither one of those positions had been included in the budget. *Id.* She was uncertain whether there would be a traffic manager. Tr. 1000. Loretta Simon also said she would supervise

sales; she said her duties in that regard would be making sure that the salespersons' spots would be carried on time or to help them in budgeting salaries. Tr. 1000.

56. Loretta Simon claims that her residence is in Montgomery, where her spouse lives, but the record reflects that since 1986 she has lived in Columbus, Georgia. Double Exh. 5, at 1. She pays taxes in Georgia, lists that address on her federal income tax, works there, holds a drivers license in Georgia and intends to send her child to school there. Tr. 981, 983, 983-85. She has even changed jobs there and did not look in Montgomery. Tr. 1007, 1011. By her own estimate she is there 260 days a year. Apparently she lived in Montgomery from 1980 to 1985 and promises to move back if a grant is made. Double Exh. 5, at 3. Simon is black and female. Double Exh. 5, at 1.

57. *White* is an Alabama corporation established on the day it filed its application for this channel, April 15, 1987. White Exh. 1, at 1; Tr. 1023. There are two stockholders, William E. White, Jr., who owns 600 shares or 60% of the stock and is the corporation's president, treasurer, and one of its two directors, and Ronda R. White, the spouse of William, who owns 400 shares or 40% of the stock and is the corporation's vice president, secretary and the other director. White Exh. 1, at 2.

58. White's Articles of Incorporation were filed in Montgomery, Alabama, on April 15, 1987. Tr. 1023. On April 13, 1987, when William White signed the application, he indicated the entity was already a corporation. Tr. 1044-48. The articles were not filed until two days later, April 15, 1987, the same day the application was filed. *Id.* White's EEO statement was dated April 15; but William White does not think he postdated that part of the application. Tr. 1054-56. White indicated in an April 14, 1987 affidavit that the stock subscription agreement had been executed. Tr. 1028. Actually, the agreement was executed on April 17, 1987. Tr. 1026-27; Double Exh. 7. William White could not explain the variance in dates. Tr. 1032-34. The stock certificates were not issued until July 1988. Tr. 1034-35.

59. William White proposes to work full time, 40 hours per week, as general manager. White Exh. 1, at 2. He will be responsible for establishing station policies and management practices and directing all facets of the station's operations and activities. *Id.* William White will leave his position at WAPZ(AM). *Id.*, at 3. He has lived in Montgomery since 1984. He has belonged to a local church since 1985, been a member of a political party since 1986, and participated in a local problem solving group, a professional organization, and the Governor's Physical Fitness Council. *Id.*, at 3-4. Since 1984 he has been general manager of an AM station in Wetumpka, Alabama. *Id.*, at 4. White is black. *Id.*, at 3.

60. Ronda White proposes to work full time, 40 hours per week, as sales manager. White Exh. 3, at 1. She will oversee and make decisions about all aspects of sales, including billing and collection. *Id.*, at 1-2. White did not participate in the formation of the applicant or preparation and prosecution of the application. Her spouse, William White, selected the applicant's lawyers (Tr. 1042, 1193); she did not know how they were selected. Tr. 1223-24. William White selected the engineer (Tr. 1043, 1193); she did not know how he was selected. Tr. 1224. William White developed the equipment proposal and selected the antenna site; Ronda White did not. Tr. 1192, 1255. William White claims that Ronda White was shown the site by him but she claims never to have visited the site. Tr. 1205; 1255. In addition, William White developed the staffing proposal which he claimed to have talked over with Ronda White. Tr. 1201. Ronda White does not remember any participation in the staffing proposal. Tr. 1253. William White also developed the budget and programming proposal. Tr. 1201, 1253. Ronda White said William White discussed them with her. Tr. 1253. Mr. White set up the public file and obtained financing without Ms. White's assistance. Tr. 1193, 1161, 1238. Mr. White took responsibility for all amendments and the second antenna site. Tr. 1192. Ms. White had nothing to do with those tasks. Tr. 1250, 1227-28. Ms. White had no knowledge about the applicant's financial obligations. Tr. 1258-62. She conceded that overall her spouse had discussed things with her but that he took the responsibility. Tr. 1230-32, 1255-56. She has lived in Montgomery since 1984 and belongs to a local church. White Exh. 3, at 2-3. From July 1983 to November 1984 she worked at WDJC-FM, Homewood, Alabama as a sales secretary and salesperson. *Id.*, at 2. From November 1984 to August 1985 she was sales manager of WAPZ(AM), Wetumpka, Alabama. *Id.* She was hired for that job by her husband (Tr. 1238) and she quit it to take a job where she could earn more money. Tr. 1238-39, 1242. The station was owned, in part, by her father-in-law. White Exh. 3, at 2; Tr. 1238. She is currently an insurance underwriter. White Exh. 3, at 1. Ronda White is a black female.

Auxiliary Power Proposals

61. All of the applicants have proposed auxiliary power, except Phelps. Clay Exh. 1, at 5; Pearce Exh. 2; Movement Exh. 9; Knight Exh. 4; Properties Exh. 4; JCT Exh. 3; Breland Exh. 7; Double Exh. 1, at 2; and White Exh. 2.

CONCLUSIONS

Compliance With Section 73.315(a), Which Requires City Grade Coverage Over Montgomery

62. The Mass Media Bureau found that all of the applicants' proposals for FM Channel 241A in Montgomery do not provide for full coverage within the city boundaries of Montgomery, as required by §73.315, the city coverage rule. *Hearing Designation Order*, 3 F.C.C. Rcd 41-42 (MMB 1988). At the time the Bureau reviewed the proposals, the maps of Montgomery used by the applicants were not uniform. For that reason, the Bureau was unable to determine if a waiver was unnecessary because 80% of Montgomery would be included within the 3.16 mV/m contour of the applicant, or whether waiver arguments should be considered. The applicants have submitted a joint engineering exhibit using a uniform current map of the Montgomery boundaries. That exhibit illustrates that no applicant achieves 80% coverage. Clay's coverage is greatest, reaching 69.7% of the city and 83.3% of the population; all other applicants, except JCT and Movement, cover at least 63.1% of the city and 78.1% of the population. JCT and Movement's proposals will cover about 54% of the city and 70.6% of the population.

63. Knight urges that those applicants that achieve coverage of 80% of the population should be found to be in substantial compliance. Pearce argues that applicants that cover 80% of Montgomery's population should receive a waiver and those who fall below 80% should be denied.

Section 73.315(a) does not address the population coverage for the 70 dBu or 3.16 mV/m signal. It requires that the 3.16 mV/m field strength signal be "provided over the entire principal community to be served." This is in contrast to the 1 mV/m contour which is to "encompass[] the urban population within the area to be served." *See* 47 C.F.R. 73.315(c). The Bureau points out that the Commission considers only coverage of the area of the community in determining compliance with §73.315(a). *Citing ABCD Broadcasting Co.*, 2 F.C.C. Rcd 6551, 6552 (HDO 1987).

64. Neither Knight nor Pearce address the specific language of the rule nor the language of the designated issue in making their arguments; they point to no instances where the Commission has used population coverage for determining compliance with §73.315(a). Knight and Pearce rely on language in *Broadcast Station Assignment Standards*, 39 F.C.C. 2d 645 (1973) where the Commission considered the standards to be applied when assigning frequencies to the various classes of service by AM stations. Here, however, the inquiry is limited to compliance with the rule governing the "FM Transmitter Location." In this proceeding none of the applicants were able to provide 80% coverage of Montgomery.

65. Phelps points out that the coverage was dictated by the size of Montgomery and the proximity of two stations operating on the first adjacent channel. White states that the possible location of a transmitter site is limited by the location of park land. Breland explains that the areas which it does not cover include a racetrack, swamps, and undeveloped land. The Mass Media Bureau represents that the location of Maxwell Air Force Base and the need to meet separation requirements results in no site being in full compliance with the city coverage rule. It is because of this that the Bureau urges that a waiver should be granted to each applicant. Under similar circumstances, the Commission has waived §73.315(a); therefore, the requests of the parties will be granted. *See Lester H. Allen*, 15 F.C.C. 2d 767 (1968); *Bay Cities Communications Corp.*, 48 Radio Reg. (P&F) 2d 926 (1980).[3]

Full-time Participation in Station Operation by Owners

Quantitative Comparison

Clay's Quantitative Integration Proposal

66. Clay has promised to work as the general manager of the proposed station on a full-time, 40 hours per week, basis. White and Pearce urge that Clay should not be credited with full-time participation because he intends to operate his insurance agency in Tuskegee, Alabama for 20 hours per week. The record does not reflect how far Tuskegee is from Montgomery but counsel in Clay's reply states it takes about 30 minutes each way. Clay currently operates and manages two stations and the insurance agency in Tuskegee. However, the two businesses are located in the same building in Tuskegee. Nevertheless, Clay has run the insurance business since 1973 and he has substantial experience managing stations. In addition, he intends to hire a manager to run the insurance business. Under these circumstances, it cannot be said that Clay's promise is unrealistic. Clay, an individual applicant, will be credited with full-time participation by a 100% owner.

Pearce' Quantitative Integration Credit

67. Pearce is an individual applicant who proposes to work full time, 40 hours per week, as the general manager of the station. Movement argues that Pearce should not be credited with full-time participation in management since he testified that he will spend 40% of his time selling time; Pearce concedes that he will but he implies that he would sell to mainly national and regional accounts. Pearce in his reply argues that his testimony indicates that he would sell time as part of his management duties and that he would be the sales manager. What Pearce's testimony indicates is that he believes all managers, as common practice, engage in regional and national sales. He did not say, as he now suggests, that he would then be acting as the sales manager. That possibility was suggested to him by counsel and he concurred, after he checked with counsel to insure he understood what he was being told. In any event, Pearce urges that even if he does devote significant time to sales activities, he should be credited with full-time participation in management. He relies on the Review Board's statement in *Voce Intersectario Verdad America, Inc.*, 100 F.C.C. 2d 1607, 1617 (Rev. Bd. 1985), where full credit was given to a sales manager who would sell time 33 hours per week, and *Delora D. Carrigan*, 100 F.C.C. 2d 721, 738 (Rev. Bd. 1985), *aff'd*, 104 F.C.C. 2d 826, 831 (1986), where a station manager, who was going to devote appreciable time to sales, received full management credit. Those cases support Pearce's contention and full-time participation in management by Pearce will be credited.

Movement's Quantitative Integration Proposal

68. Movement is a non-stock, not-for-profit corporation which is directed by a board of directors, none of whom will work at the station in management on a day-to-day basis. Movement asserts that because the group is community based and it will set policy for the management, it should receive integration credit. Meritorious as that argument might be, the Commission's comparative policy considers a proprietor's promise only to the extent that that promise is one to participate in the day-to-day operation of the station. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 395 (1965). Movement has not made that promise and will not receive integration credit. *See Pittsfield Community TV Ass'n*, 94 F.C.C. 2d 1320, 1323 (Rev. Bd. 1983).

Knight's Quantitative Integration Proposal

69. Knight is an individual applicant and he proposes to work full time, 40 hours per week, as the general manager of the proposed facility. Movement urges that Knight will not be able to fulfill his promise because of the large number of civic activities he participates in. Knight's promise is realistic because he claims that he currently works 40 to 50 hours a week and maintains his civic interests. In addition, he has said he will curtail his other activities if it is necessary to meet his 40 hour per week commitment.

70. Movement and Properties argue that Knight will not spend the full 40 hours at the station because he now only spends 20-30 hours managing WVAS-FM and he believes that that has been an adequate amount of time to properly run the station. When Knight was asked about the additional time, he explained that he would be free from his other job as director of communications and public affairs for Alabama State University and could,

therefore, spend more time at the station. Knight stated that he believed that this proposed station might take three to four hours per day more because there would be added duties which would include sales. Properties concludes from this testimony (Tr. 389) that Knight would spend only 25 hours per week. But that is not what Knight said, the substance of his testimony is that he could now spend more time and there would be added duties that would require more time because his proposal is for a commercial station. Movement also argues that Knight's promise to be involved in sales shows that he will undertake a non-managerial role. Again, this mischaracterizes Knight's testimony. He said he would be involved in the sales "process"; he did not indicate that his involvement would not be managerial. Knight is also entitled to full credit for his promise to participate in station management on a full-time basis.

Properties' Quantitative Integration Credit

71. Properties is a limited partnership with one general partner, Allan G. Stroh, and three limited partners, Carl Barranco, Ben C. Collier, and June M. Collier-Mason. After the close of the record Ben C. Collier was replaced by B. Stephen Schloss, but for purposes of comparative analysis the result reached will be about the same. Stroh promises to work full time, 40 hours per week, as the general manager. Knight argues that Stroh will not exercise 100% control of the partnership but that he will share control with limited partner Carl Barranco. Barranco is an accountant who holds the same equity as Stroh, 20%; he received his share for finding investors for Stroh, putting the partnership together, and monitoring the partnership for the other limited partners.

72. Stroh works at a broadcast station and when he heard this channel was available, he asked Barranco for his help in locating the money to build the facility and pursue an application. Barranco, after reviewing Stroh's analysis of the facility, concluded that two of his longtime clients should invest. Those investors, Collier and Collier-Mason, have also agreed to guarantee the bank loan.[4] Barranco has also been involved in finding counsel for the applicant, he has reviewed the partnership agreement for the limited partners, his clients, and he has generally been kept informed about the proposal by Stroh as part of his overseeing the limited partners' investment. This is what he has done in the past when they have made investments at his suggestion. Barranco and Stroh are longtime friends and see each other regularly. When they do, Stroh often tells Barranco about the proceeding. Stroh also makes all requests for funds from the limited partners through Barranco, who then asks the limited partners for the money. Stroh believes this relationship will continue if the application is granted.

73. Knight urges that Stroh's relationship with Barranco establishes that Stroh will not exercise full control. Under some circumstances that might be the case, but here it does not appear that Barranco will exercise any control over day-to-day station business. First, it was Stroh who asked Barranco to find financing for his proposal. The limited partners are people who have invested in similar transactions and there is no evidence that they have actively run those businesses. Aside from insuring financing and inquiring about the progress of the licensing process, there is no evidence that Barranco has made any of the decisions about the proposal. Barranco frequently organizes partnerships and receives a stake in the partnership for his services; in this case he has done just what he normally does in providing his professional services. There is no reason to believe that stake has led to his controlling the business by making decisions about the day-to-day operation. The role played by a non-controlling owner in the formation of the applicant is not necessarily dispositive of whether the applicant, once established as an ongoing business, will be secretly managed by its passive investors. *Victory Media, Inc.*, 3 F.C.C. Rcd 2073, 2074 (1988) *citing KIST*, 102 F.C.C. 2d at 291 n. 8. Importantly, the limited partnership agreement specifically forecloses an involvement by the limited partners and is consistent with the Commission's guidelines for insulated partnerships.

74. JCT urges that the investing limited partners have only an obligation to provide $16,000, which they have already provided, and that they could place Stroh in a position where he would have to accept their control if they are to provide more money to finance the station. That may be possible, but the investors have already guaranteed the bank loan and Stroh can turn to other limited partners if the existing partners decide not to continue. Apparently that is not going to be a problem since the withdrawal of Collier has resulted in a new partner being found. Properties is entitled to full credit for Stroh's promise to manage the station. It is entitled to be credited for its claim of full-time management by a person who will exercise complete control.

JCT's Quantitative Integration Proposal

75. JCT is a limited partnership with one general partner, Janet May, who proposes to work full time, 40 hours per week, as the station's general manager, and two limited partners, H. Hunter White, III and his brother, Michael White. May and the Whites purportedly intend to share the equity, with May holding 50% and the Whites 50%; they also claim that May will exercise complete control. The opposing parties argue that it is unlikely that May will control 50% of the equity or very much of it at all, and they urge that JCT is not an insulated partnership with May holding all the control. May has a very precarious personal financial condition and, even though she controls when capital calls are made, she has been unable to make her contribution. There have been two calls for capital. The first was for $2,500 and, while May made that payment, according to Hunter White, she later removed her contribution because she needed the money.[5] The second was for $3,000 and she was unable to make that call and had to borrow the money from White.

76. The ultimate equity that JCT's partners will hold is dependent on their contributions to the cost of pursuing the application, which will be made through capital payments. The record reflects that virtually none of the debts for legal fees and other expenses have been paid. It cannot be concluded that May has been able to make any payments to the partnership, one she retracted and the other she borrowed from White, a limited partner. Her attempts to sell off part of her equity were unavailing, unless she was willing to sell more than 50% of the partnership. She owes $50,000 in personal and business debts, her business, as a result of debts, had to give up its offices and relocate in her home. May is currently faced with liens and judgments. White's testimony shows that he is fairly sanguine about these debts and May's inability to participate, because he knows that her inability to contribute will enhance his equity under the partnership agreement. In fact,

White, whose idea it was to apply and who recruited May to join him only because of her qualitative attributes, did not investigate May's ability to contribute or maintain her equity interest. White never sought to determine whether May is a competent business person or broadcaster. It must be assumed that that line of inquiry would be of primary importance to an investor in a legitimate business entity.

77. At the close of the record, JCT had outstanding bills of $25,000. The inference to be drawn is that JCT has not paid its debts because there would then be a dramatic shift in equity. May believed that in order to maintain her equity she would have to contribute $30,000, none of which she has been able to provide. White estimates that the costs of the proceeding will be close to $100,000. The ultimate conclusion to be reached from these facts is that it is, as the opposing parties have claimed, very unlikely that May will hold much, if any equity. At best JCT's claim that May will hold 50% of the equity is too uncertain to be credited; it would not be reasonable to conclude that she will be able to raise her share of this very expensive proceeding when she has failed to do so thus far.

78. JCT was organized by the limited partner, Hunter White, who usually invests also for his brother. He decided to file a series of applications after he sent for a brochure on investing in comparative applications for broadcast facilities. He selected ten markets where new FM allocations have been made and proceeded to organize applications. White is not a neophyte to Commission proceedings; he has already turned a modest $20,000 investment in cellular radio telephone lottery proceedings into $300,000 by selling permits he was awarded with other investors. The brochure White sent for explained what attributes it took to win a comparative proceeding and White set out to locate someone who had those attributes. May fits that bill; she lives in Montgomery, she has worked at a broadcast station, and she is entitled to preferences because of her color and gender. White did not look behind those surface attributes, although he candidly admitted that if he were looking for someone to operate a communications entity he would want them to have a business track record and, if the person were to manage a radio station, to have sales experience.

79. White never even inquired about May's business acumen or her broadcast experience. He selected her because she fit the comparative criteria. White testified that May's ability was not important to him because he looked to the value of the permit to assure a good return. Recently one of White's entities settled a comparative case in Belle Chasse, Louisiana; as a result of that settlement, it appears that White will become not only a voting owner but that he will have negative control. At the comparative stage, White purportedly held no control over the Belle Chasse applicant. He was, like he represents here, only a limited partner. *See* "Integration and Diversification Statement of Randolph J. Callendar," filed June 10, 1988 in MM Docket No. 88-206.

80. These facts lead to the conclusion that it is unlikely that May will have more than a nominal financial stake in the entity and that her financial interest will likely relate to her ability to control as the Review Board suggested in *Independent Masters, Ltd.*, 104 F.C.C. 2d 178, 185-92 (Rev. Bd. 1986) and *Magdalene Gunden Partnership*, 3 F.C.C. Rcd 488, 489 (Rev. Bd. 1988).

81. May has undertaken some tasks on behalf of the applicant but most significant steps have been taken by other persons. May claims she selected the communications counsel. The actual facts are different. White accompanied May to Washington to meet with lawyers who had represented him in his cellular applications. After meeting with two of them, purportedly May selected one. The application was prepared by counsel, although it was reviewed by May. She has done some other perfunctory tasks such as locate an antenna site, in response to the consulting engineers' request, and maintained a partnership bank account. Of greater significance in judging her control, is White's assumption of his secretary's limited partnership interest in JCT without May even becoming aware of it, until long after the fact, when White chose to tell her. He did this despite the fact that the partnership agreement provides in §12.1 that no limited partnership interest may be assigned unless written notice is provided to the general partner and she consents.

82. Breland argues that the partnership agreement permits removal of the general partner for moral turpitude (Article 10, §10.6) and that that standard is too vague to insure the general partners' insulation under Commission requirements. JCT responds that the provision does not leave it to the discretion of the limited partner to determine when such an offense exists; it provides that there must be a conviction of such an offense under law. Breland also urges that the JCT partnership agreement fails to permit the general partner to veto a new general partner appointed by the limited partners. JCT has not explained how its partnership meets that requirement. There is no explicit provision which does so. *See Instructions to Form 301 Section II*, which requires that claims of insulation must, in the partnership agreement, "empower[] the general partner to veto any admissions of additional general partners admitted by vote of the exempt limited partners."

83. Breland urges that May's promise to work full time is too indefinite to be credited in light of her intention to continue the advertising business which she owns. But May has said she will leave that business, although she may not dissolve it, in order to fulfill her promise. There is insufficient record evidence to conclude that she will not. The inferences, which Breland argues for, about May's need to continue managing her financially troubled business is not supported by record facts.

84. Nevertheless, it is not possible on this record to attribute any integration credit to May's promise to manage the station. This is dictated not because May will not devote full time to the entity but because her control of the partnership has not been established. Her equity, if any, cannot be determined because she is unable to meet her own capital calls. This is despite the fact that JCT has postponed paying nearly all of the expenses of the proceeding except the Commission's filing fees. The partnership agreement, moreover, does not insulate her from the control of the limited partners in the respects required by the Commission and limited partner White has exercised control from the outset. He has controlled where advice would be sought, who would be partners, and what the goals of the partnership would be. He has, on at least one occasion, changed the partnership's owners without even consulting the general partner, although the partnership agreement requires her consent. This is not a case like *Independent Masters, Ltd.*, 104 F.C.C. 2d 178, *supra*, where the general partner was a former broadcaster with a long,

distinguished broadcast record. May has not worked in broadcasting since 1982 and then she was not involved in managing the station. There is evidence that she is a poor business manager and is unable to run a successful operation. There is no evidence that a large scale communications investor like White would invest nearly $100,000 and not seek some control over the risk which May presents as general partner.

Breland's Quantitative Proposal

85. Breland proposes to work full time, 40 hours per week, as the general manager of the station. JCT and Phelps argue that it is unrealistic to assume that Breland Valeska, Breland's only owner, will leave her job as a lawyer for the State of Alabama to run a radio station. Neither opposition provides any facts to support that conclusion. Her position with the state has been short term; Breland Valeska has held the position only since February 1988. During the preceding two years she did not work, before that, from 1984 to 1986, she worked in Washington, and from 1976 to 1984 she worked for the State of Alabama. Breland Exh. 1; Tr. 760-61. She appears to be quite willing to leave one job for another. JCT also suggests that Breland may ultimately relinquish her controlling ownership to raise money. That allegation is simply speculation. Breland is entitled to full-time credit for the integration promise of Breland Valeska and because she is a sole owner that credit is one with 100% control.

Phelps' Quantitative Integration Credit

86. Phelps is an individual applicant who has promised to work full time, 40 hours per week, as general manager of the station. Breland argues that Phelps' promise is too vague. Phelps responds that she stated what position she would hold and explained what duties she would perform. She also points out that she has managed a radio broadcast station for 14 years. Breland's argument is without merit and Phelps is entitled to full credit for her promise.

Double's Quantitative Integration Credit

87. Double is a corporation with three stockholders, Hilton L. (Tracy) Larkin, who owns 33.39% of the shares, Tommy Simon, who owns 33.32% of the shares, and Loretta Simon, who owns 33.29% of the shares. They are all officers and directors and they propose to work full time, 40 hours per week, at the station. Tracy Larkin proposes to work as the general manager, Tommy Simon as operations manager, and Loretta Simon as business manager.

88. Knight, Phelps, and White argue that Loretta Simon's integration should not be credited or, at least, fully credited. It is urged that Loretta Simon's interest should not be credited because her shares were not timely formalized and because most of her duties will be clerical.

89. Loretta Simon's ownership interest in the proposal has changed several times. Unlike her spouse, Tommy Simon, and Tracy Larkin, she is not employed in broadcasting. In May 1984, she held two shares while Tommy Simon and Tracy Larkin each held 499 shares. Certificates for those shares were never issued. By November 1985, her interest was .33% and Norman Lumpkin, a local broadcaster, had become a 33.33% owner. The three major stockholders, Tommy Simon, Larkin and Lumpkin, planned on operating the station but the minor stockholder, Loretta Simon, did not. However, two weeks before the application was filed, in April 1987, Lumpkin dropped out and Loretta Simon became a major owner. Although her shares were issued to her in July 1987, it was not until December of 1987 that she paid $997 for them. The corporate documents memorializing those changes are not always accurate. For example, they indicate that Loretta Simon signed a stock subscription agreement, but she actually never did. But "discrepancies in the corporate papers do not necessarily mean that the applicant is a sham." *Coast TV*, 66 Radio Reg. (P&F) 2d 25, 28 (1989), 4 F.C.C. Rcd 1786, 1788 (1989). Aside from the problems with the corporate documents, Knight urges that there is no real intention by Loretta Simon and the other stockholders in Double to have her participate in the proposal. Knight points out that despite Simon's position as secretary, treasurer, and business manager of the corporation, she provided no assistance in completing the application, she does not pay the bills, she does not know how much money the principals have provided[6] and she has no responsibility for keeping the application current. In addition, she provided no assistance in developing the proposal. Tommy Simon implied that this was because she did not know anything about the broadcast business.

90. Knight also urges that the duties which Loretta Simon will perform as business manager will be largely clerical. When asked what her duties would be, she said she would participate in payroll matters, taxes, accounting and bookkeeping and would supervise all employees engaged in those activities. Questioned further about which employees she would supervise, Simon said she would supervise the receptionist and the office manager. But that answer did not add substance to her proposal, since, she conceded, the budget had not included either position. She was also uncertain whether there would be a traffic manager or whether she would undertake those duties. In her testimony, she indicated that in supervising sales she would include in her duties insuring that spots were carried in the ordered time periods, which is a duty normally performed by the traffic manager.

91. In light of Simon's passive role in the application process and her own description of her duties, it is apparent that Loretta Simon will not exercise legal responsibility for the corporation and from her own description of proposed integration, it is evident that she will not occupy a position where she will perform policy functions and an "important role in management." *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 395 (1965). Although the *Policy Statement* generally accords full credit to the position of business manager, in the case of Loretta Simon, that position will not include the attributes which warrant particular weight. Only the integration proposals for Tommy Simon and Tracy Larkin[7] will be weighed; those proposals represent 66.71% of the ownership of Double.

White's Quantitative Integration Credit

92. White proposes to integrate its two owners, William and Ronda White. William White owns 60% of the stock and Ronda White the remaining 40% of the stock. They are officers and directors; Mr. White promises to work full time, 40 hours per week, as the station's general manager and Ms. White will work full time, 40 hours per week, as the sales manager. Knight, Double and Clay urge that an inference exists that Ms. White will not perform an active role in policy and management at the station because she has not participated in organizing and pursu-

ing the proposal. While White argues that she has participated, the record reflects that she was told about the decisions but that she did not assist in making decisions nor did she make any decisions herself. Mr. White selected all the persons who performed technical assistance for legal and engineering matters. He also established the proposal, located the antenna sites, and found financing. There were no functions performed by Ms. White. But, unlike the same inference that arose about Double's proposal, Ms. White has experience working as a station sales manager, as recently as 1985. She then worked for eight months at the same station where her spouse is now the manager and her father-in-law is one of the owners. However, she left that position because she could earn more in another line of work. Before that she worked in time sales at a Homewood, Alabama station for seventeen months, from July 1983 to November 1984. Thus, she worked in broadcast sales at two stations for a little over two years, four years ago.

93. Since that time, she has become an insurance underwriter and she has not worked in broadcasting. Ms. White's reason for leaving the Wetumpka station was not because she did not like the work, it was because she could make more money elsewhere. She explained that the station's monetary limitations were due entirely to the station's religious format. Tr. 1239-42. (She did concede, however, that the four other sales people at the station did not leave the Wetumpka station when she did. *Id.*) The judgment that Ms. White can realistically be counted on to manage sales activities is based on her past interest and experience and the fact that she and her spouse will control the operation and have every personal incentive to succeed, unlike their experience at the Wetumpka station. This is a close question since Ms. White has shown virtually no interest in the proposal so far, but Ms. White appeared to be a sincere and honest person. She did not, for example, as Double's Loretta Simon did, give untruthful testimony about material facts. *See* Findings at ¶ 56 and Conclusions at ¶ 89, n. 6.

94. Knight and Double also argue that White's proposal was indefinite because there were inconsistencies in the corporate documents and the stock had not issued when the application was filed. The alleged inconsistencies do not evidence uncertainty; the documents which were incorrectly dated involved only a matter of two or three days and they do not show an uncertain mind about the nature of the entity or the Whites' intention to own, control and pursue their proposal. Knight and Double do not point to any evidence that the Whites had not decided to pursue their interests in the Montgomery facility. Double and Clay also urge that because Mr. White was found guilty for passing a bad check and he failed to timely notify the Commission about his father's 10% interest in a broadcast entity, the applicant is unreliable. The record on these matters is insufficient to disqualify the applicant. Neither Double nor Clay raised them before the hearing; they did not urge in prehearing motions that these factors were so serious as to disqualify White. They also did not do so following the hearing. White is entitled to full credit for its integration proposal to have owners with 100% control actively managing the station on a day-to-day basis.

Comparison of the Applicant's Quantitative Integration Credit

95. Seven applicants have been credited with full-time integration by persons with 100% control who intend to manage the station; they are Clay, Pearce, Knight Properties, Breland, Phelps, and White. These applicants are entitled to comparison of their qualitative attributes. Movement and JCT have received no integration credit and Double has been assessed credit for persons owning about 67% of the control; Movement, JCT and Double's proposals are not sufficiently close to the seven applicants who propose complete control by 100% owners to be entitled to comparison of their qualitative proposals.

Qualitative Integration Proposals of Managers and Owners

Clay's Qualitative Integration Proposal

96. Clay does not live in Montgomery but he will move there. Clay has been involved in regional and statewide activities which he claims involve Montgomery community interests. Although these activities have been within the last five years and require only monthly attendance at board meetings, Clay did not quantify the extent to which Montgomery interests were involved. Therefore, it is not possible to say that Clay's statewide activities "indicate a knowledge of and interest in the welfare of" Montgomery. *Policy Statement, supra*, 1 F.C.C. 2d 393, 396. Clay has owned and operated broadcast stations in Alabama since 1975. From 1978 to the present, he has been general manager of an AM and a FM station. He is entitled to thirteen years of broadcast management experience. Clay receives an additional preference because he is black.

Pearce's Qualitative Integration Proposal

97. Pearce will move to Montgomery; he does not now live there. He currently is sales manager at an AM-FM combination in Tuscaloosa, Alabama. He has been a manager since April 1987 and worked at the station in sales since 1985. He will quit that job if he receives a grant. Pearce is entitled to credit for approximately three years of broadcast experience and one of those years was as a manager.

Knight's Qualitative Integration Proposal

98. Knight has lived in Montgomery since 1945, all of his life. He participates in numerous organizations which indicates he has a knowledge of and interest in the welfare of the community. While he has participated in some of them since 1969, most of his activities began in the mid-1970's, after he completed college, and have been continuous to the time the record was made in this proceeding. Knight also has broadcast experience; he is general manager of WVAS-FM where he works for 20-30 hours per week. He became manager in 1984. Tr. 410. Knight claims broadcast experience for announcing sporting events for the Alabama State University Sports Network, which he began in 1976. No credit can be given for that job, however, because he gives no estimate of how much time he spent or how long he did the job. Knight also asserts involvement with a sports network but there is no indication that this involved working at a broadcast station. Knight is entitled to credit as a part-time manager at WVAS for four years. Knight is black and receives a minority preference.

Properties' Qualitative Integration Proposal

99. Properties general partner, Allan Stroh, has lived in Montgomery since 1964. He has participated in numerous civic and community activities. Stroh has worked nearly continuously at broadcast stations since 1974. He is now general sales manager at a Montgomery station where he supervises six people. Stroh has approximately thirteen years of broadcast experience. He will quit his current job if a grant is made to Properties.

Breland's Qualitative Integration Proposal

100. Breland Valeska has lived in Montgomery continuously for two years since September 1986. She also lived in Montgomery for four months in 1975 and for about eight years from 1976 to 1984. She has, since returning to Montgomery, participated in a few community activities that indicate an interest in the welfare of the community. Breland Valeska is entitled to credit for being a female. She has no broadcast experience.

Phelps' Qualitative Integration Proposal

101. Phelps, with absences during eight years in the 1940s and early 1950s, has lived in Montgomery since 1923, all of her life. She has been active in local activities which evidences a knowledge of and interest in the welfare of the community since 1950. She has worked at a broadcast station since 1961; and since 1974 she has been general manager of a local station. She is credited with 27 years of broadcast experience. She also receives a female preference.

White's Qualitative Integration Proposal

102. William and Ronda White have lived in Montgomery since 1984. William White has belonged to a few local organizations beginning in 1985. He also works as general manager of an AM station in Wetumpka, Alabama. He has worked there since 1984. Both Whites are black and Ronda White is entitled to female credit. For nine months in 1984-85, Ronda White was a sales manager at an Alabama station and for a year and five months in 1983-84 she worked in sales at another broadcast station.

Comparison of the Qualitative Proposals

103. All of the integrated principals of Knight, Properties, Breland, Phelps and White currently live in Montgomery. While Clay and Pearce will move to Montgomery, those principals who live in the community currently are preferred. Among those who live in the community now, all but Ronda White have participated in local activities, indicating a knowledge of and interest in the welfare of the community. If ranked according to time lived in Montgomery, Phelps has the longest residence, followed by Knight. But the difference in the number of years between them is not qualitatively different. They both have lived in Montgomery for essentially their entire lives. Because Phelps is older she has participated in local activities for a much longer and continuous period of time than Knight. While Knight has a long list of local activities it cannot be said they are more or less indicative of an understanding of the welfare of the community than Phelps' long list. Both Phelps and Knight have been continuously active in community affairs throughout their adult years. Phelps and Knight are equal on the criteria of local residency and civic interest. Properties' principal, Allan Stroh, has lived in the community since 1964 and his involvement in the community has also been substantial. He is next best on the criteria of local residence and civic involvement.

104. Breland Valeska has lived in Montgomery about ten years, off and on, but her residence has not been anywhere as continuous as Phelps, Knight, and Allan Stroh, who have lived in Montgomery for many years. Breland has also had only limited involvement in local activities and only since September 1986. The Whites have lived in Montgomery since 1984 but William White's involvement in the community has been minimal and Ronda White has no record of involvement. Overall, on these two criteria, Phelps and Knight are to be preferred. Properties' Stroh is just about their equal. The others in order of comparative preference are Breland-Valeska, who is comparatively less desirable than Phelps, Knight, Stroh, and then the Whites. Clay and Pierce are less preferred than all of these applicants because they do not live in the community.

105. Phelps also has the greatest amount of broadcast experience and broadcast management experience and she is to be substantially preferred over all other applicants in this area of comparison. She began working at a broadcast station in 1961 and has been the general manager of that station since 1974. Clay is comparatively better than all other applicants but Phelps since his broadcast experience began in 1975 and he has been a general manager from the beginning. Clay is followed closely in comparative rank by Properties' Stroh, who has worked in broadcasting since 1974, always continuously but not always as a manager. The Whites, Pearce, and Knight also have broadcast experience but it is within the last four years, although it also includes management. Knight's experience is also not full time. William White and Knight have managed longer than Pearce but Ronda White, who owns 40% of the applicant, has less experience and has not worked at a station since 1985. Overall, Pearce, Knight and White are about equal on this criteria. Breland has no broadcast experience.

106. Clay, Knight, and William and Ronda White, are entitled to credit for minority ownership because 100% of their owners are black. Breland and Phelps are female and 100% owners and Ronda White, who owns a 40% interest, is also female; they are entitled to a preference because they are female, although it is of less weight than the minority preference assigned to Clay, Knight and the Whites because they are black.

107. Phelps and Knight are equally preferred for their lifetime local residence and community involvement. Phelps is preferred over Knight because of her longtime broadcast employment. But Knight is entitled to have his minority status weighed as equal to local residency and Phelps' female status is not entitled to as much weight as Knight's minority preference. Phelps' preference over Knight on broadcast experience does not make them equal because broadcast experience is of slight weight. On qualitative and quantitative promises to integrate full time, Knight is to be slightly preferred over Phelps because of the importance his minority status presents over Phelp's female preference and her longer but much less important broadcast experience. Because of their minority status and broadcast experience, the Whites are comparatively stronger than Breland.

108. Properties' Stroh has longtime local residence, community involvement, and broadcast experience. However, his qualitative attributes do not outweigh those of

White, Breland, and Clay. Despite the fact that the Whites' residence in the community is recent and their involvement in its activities is insignificant next to Stroh's and their broadcast experience is not as extensive, it warrants some credit and is not so weak that Stroh is to be preferred over their minority and female status. In addition, Mr. White's broadcast experience is recent and it has been as a station manager. Moreover, Ms. White's broadcast experience is relatively recent and it was in a management position equal to Stroh's. Breland Valeska lives in Montgomery, has limited involvement in its civic affairs and is entitled to a female preference. Her female preference is at least equal to Stroh's broadcast experience and his community involvement and more years of local residency.

109. Clay will move to the community, he is entitled to a minority preference and his broadcast experience is recent, longtime, and at a management level. It cannot be said that Stroh's qualities are better than Clay's. Clay's broadcast experience as a station manager is of a longer term than Stroh's experience as a sales manager. Clay's minority preference and promise to move to Montgomery compares to Stroh's residency and community involvement. Clay's broadcast experience is not as long as Stroh's but it is of great quality. Clay is to be slightly preferred over Stroh. Pearce, who will move to the community and has only five years of broadcast experience, is least preferred qualitatively.

Diversification of Control of the Media of Mass Communications

110. Clay, Pearce and Knight currently own or have associations with broadcast media. They have timely promised to divest those interests. Movement and its principals have no mass media interests. Properties' principal Allan Stroh is associated with a broadcast station but he will end that association. Properties' limited partners have mass media interests but because they are insulated from control of the partnership, their interests will not be weighed. White and Breland have no mass media interests. Double's stockholders, Tracy Larkin and Tommy Simon, are currently associated with broadcast stations. Simon will end his association but Larkin is unsure about whether he will end his with a local public television station where he works part time. However, Larkin's role at the television station is not a "significant managerial position."

Therefore, Double has no attributable mass media interests. JCT's limited partnership is not insulated. Its general partner, Janet May, owns a Montgomery advertising agency. May has promised that the agency will not perform services for broadcast stations or place advertising on broadcast stations. There is no evidence that the agency has any relationship with local media. JCT's limited partner, H. Hunter White, owns a 19.125% equity interest in a construction permit for Belle Chasse, Louisiana. He has a 36.5% voting interest in the 51% owner of the permit. JCT has not explained whether this interest represents control. The facility, when it is built, will be some distance from Montgomery and is of slight comparative importance.

111. Phelps is currently manager of a Montgomery radio station and an officer of the entity that owns the station. She will end those associations. In addition, she is an officer of licensees for two stations in Columbia, South Carolina, one station in Columbus, Georgia, one station in Atlanta, Georgia, one station in Charlotte, North Carolina, one station in Asheville, North Carolina, and one station in Norristown, Pennsylvania. She oversees various aspects of these stations for their owner, George H. Buck. Buck, who is blind, receives weekly oral reports from Phelps. If Phelps receives a grant, she will make reports monthly and spend 4-5 hours per week on the affairs of these station. From Phelps' testimony it is apparent that her association with the stations is managerial and significant. The stations are all at least 77 or more miles from Montgomery, although all but one of them are in the south. None of the stations have great signal strength and they all operate in markets with other facilities. Phelps, because of this association, is the least preferred on diversification. JCT is the only other applicant with attributable media interests and it is very slightly less preferred than those applicants who have no interests: Clay, Pearce, Knight, Properties, Double, Movement, Breland, and White.

Summary Conclusions

112. All the applicants are qualified and entitled to a waiver of the city coverage issue. They are all equal on the comparative criterion of auxiliary power except Phelps who does not propose auxiliary power. All but JCT and Phelps are equal on diversification of mass media interests. Their quantitative integration proposals are equal except for Movement, JCT, and Double. Movement, JCT and Double have not proposed enough integration of owners into management to be compared with the seven applicants who propose 100% integration of owners into management on a full-time basis. Knight is qualitatively slightly better than Phelps and they are both qualitatively better than the six other applicants. However, Phelps has a continuing management relationship to a number of broadcast stations in the same region as Montgomery, Knight has no continuing relationship to other media interests. In addition, Knight has proposed auxiliary power and Phelps has not. Knight is to be preferred overall. The other applicants, in order of comparative standing, are the same as ranked under quantitative and qualitative integration.

ACCORDINGLY, IT IS ORDERED that the petition for leave to amend, filed December 15, 1988 by Double LS Broadcasting, Inc. IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the motion to strike unauthorized pleading, filed January 9, 1989 by Linda Breland Valeska d/b/a Breland Broadcasting IS GRANTED.

IT IS FURTHER ORDERED that the petition for leave to amend and amendment, filed April 3, 1989 by G. Dean Pearce IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the petition for leave to amend and amendment, filed April 28, 1989 by JCT Broadcasting Limited Partnership IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the petition for leave to amend, filed November 14, 1988 by White Broadcasting Network, Inc. IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the petition for leave to amend, filed May 23, 1989 by G. Dean Pearce IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the applications of George Henry Clay (File No. BPH-870327KB), G. Dean Pearce (File No. BPH-870330MY), Alabama Radio Movement, Inc. (File No. BPH-870331ML), Montgomery Broadcast Properties, Ltd. (File No. BPH-870415KO), JCT Broadcasting Limited Partnership (File No. 870415MB), Linda Breland Valeska, d/b/a Breland Broadcasting (File No. BPH-870415MI), June N. Phelps (File No. BPH-870415MM), Double LS Broadcasting, Inc. (File No. BPH-870415MN), and White Broadcasting Network, Inc. (File No. BPH-870415MR) ARE DENIED and the application of Johnnie F. Knight (File No. BPH-870414KG) for a construction permit for a new FM station on Channel 241A in Montgomery, Alabama IS GRANTED.[8]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

[1] The Brusly application was dismissed and White's partnership was paid $146,000. *See* Statement for the Record, filed April 7, 1989 by JCT Broadcasting Limited Partnership and *Memorandum Opinion and Order*, FCC 89M-23, released January 6, 1989. White's Belle Chasse Media Group, which has applied for Belle Chasse, Louisiana has proposed a settlement in which White's Partnership will own 51% of the winning applicant, Belle Chasse Broadcasting Corporation, and 36.5% of the voting interest. Although JCT has also filed a petition for leave to amend to reflect the settlement of the Belle Chasse proceeding. Belle Chasse Broadcasting Corporation has reported in MM Docket No. 82-206, on May 8, 1989, that Hunter White has now acquired the interest of Mary Faye Gilbert. This increases White's equity. He will own 24.5% of the permittee directly and 37.5% of the partnership. First Belle Chasse Media Group, which includes his 36.5% general partnership interest and a 1% limited partnership interest. First Belle Chasse owns 51% of the proposed permittee, Belle Chasse Broadcasting Corporation.

[2] On December 15, 1988, Double notified the Commission that Tommy Simon changed employment from Arnov Realty to Discount Realty Services. Mr. Simon states in the amendment that he will work 40 hours at the station but he does not promise to leave his position at Discount Realty Services.

[3] Breland urges that Double and Properties' applications should be dismissed for failing to file proposed findings and conclusions on this issue. Neither applicant has explained why it did not comply with the order to file findings. While §1.263(c) permits dismissal for failing to file findings, Double and Properties did file findings on some of the other issues. Under these circumstances, Double and Properties' dereliction is not serious enough to warrant dismissing their applications. Additionally, because the Bureau represents that all applicants are similarly situated on this issue, Double and Properties' participation was not crucial to resolution of the issue as it applied to them.

[4] Because Collier was replaced by Schloss after the close of the record, it is not known what Schloss' relationship is to Barranco or whether Barranco located Schloss. And no reason has been provided for Collier's withdrawal from the partnership.

[5] JCT argues in its reply that the record does not support a finding that May took back her first payment. But that claim is not supported by the record as a whole. White was asked a number of times about May's retrieval of her capital payment and each time White said that May took the money back. Tr. 663, 664. While White initially said he heard she "may" have taken the money back, when asked again he said, "I think so, I think that's right." White was unable to say whether May ever put the money back. Tr. 664. Moreover, when money was needed to pay the hearing fee of $6,000, May could not pay her share and she asked White to lend her the money. *Id.* JCT's suggestion that May did not take the money back would be contrary to her past behavior. May, as an employer, was expected to forward federal tax money she withheld from her employees' wages; instead, she used the money for other purposes. That action on her part resulted in a tax lien, which she has yet to pay. There is no objective evidence that justifies JCT's unsupported claim (Reply, at 6, n. 4) that half the equity has been contributed by May.

[6] Double argues that Loretta Simon did know how much money had been contributed and spent. They point to her statement that she believed that the stockholders had each contributed $10,000. But her testimony conflicts with that of the two active stockholders who said that each stockholder has contributed $20,000. Their day-to-day involvement in the proposal makes their answer more creditable. Double also urges, citing Tr. 899, 951, that Loretta Simon participates in board meetings and takes minutes. Those record cites do not support that claim.

[7] White urges that Larkin should not be given full credit because he will continue his position with a public television station. It does not appear that Larkin's position will interfere with his promise to Double; he currently works about two and one half hours each day at the station and the position is in addition to his full-time job. Apparently, he works there in the early evening.

[8] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

FRED FARLEY File No. 10110-CL-P-676-A-88

For authority to construct and
operate a Domestic Public
Cellular Radio Telecommunications
Service on Frequency Block A in
Utah Rural Service Area
#4 - Beaver

MEMORANDUM OPINION AND ORDER

Adopted: May 25, 1989; Released: June 5, 1989

By the Chief, Common Carrier Bureau:

1. Fred Farley (Farley) has filed a petition for reconsideration and reinstatement. Farley's rural cellular application was selected first in the lottery for the non-wireline cellular construction authorization for the Utah Rural Service Area (RSA) No. 4 - Beaver (Market No. 676). By letter dated December 22, 1988, the Mobile Services Division (MSD) dismissed the application. The MSD stated that the application was being dismissed as defective because the paper original of the referenced application, which was timely submitted in accordance with the Commission's rules, did not match the microfiche application which was initially filed. The MSD noted that Farley filed the original paper application for Market No. 675, Utah 3 -Juab, rather than for Market No. 676, Utah 4 -Beaver. Farley asks the Bureau to waive the seven-day post-lottery filing deadline for submission of the correct paper original application, reconsider the dismissal of his application and reinstate the application to pending status. No oppositions have been filed. For the reasons set forth below, we find good cause for waiving the requirement at issue, and we will reinstate Farley's application.

I. BACKGROUND AND CONTENTIONS

2. Under the Commission's rules, applications for RSA cellular systems are initially filed in microfiche form. Subsequently, the applicant selected in the lottery must provide within seven days of the public notice announcing the lottery results the original and two paper copies of the application. Farley explains that due to a clerical error by his application preparer, the original paper application for the Juab market was filed with the Commission on December 16, 1988, instead of the original paper application for the Beaver market. Farley points out that once the error was discovered, he notified the Commission of the error by letter dated December 20, 1989. In that letter, Farley states that he withdrew the December 16, 1988 filing and requested an extension of time to December 23, 1988 within which to file the correct original paper application. Farley indicates that he filed with the Commission the original paper application for the Beaver market on December 22, 1988, three days after it was due. Hence, Farley argues that, despite the Commission's characterization that his application was dismissed because the December 16, 1988 filing did not match the microfiche version of the application, in reality, his application was dismissed because the correct original paper application was filed three days late.

3. Farley contends that the Commission acted improperly by strictly enforcing the seven-day filing deadline of Section 22.923(b)(2) and failing to grant a short extension of time within which to file the correct paper original application. In this regard, Farley states that beginning with Metropolitan Statistical Area (MSA) cellular markets 121-185, the Commission has routinely enforced pre-lottery filing window deadlines strictly while, at the same time, post-lottery filing deadlines have been extended or waived.[1] Farley states that the difference in treatment of pre-lottery filing deadlines as opposed to post-lottery filing deadlines is based on the Commission's policy of seeking to expedite service to the public. Under this policy, Farley maintains, the Commission's strict enforcement of pre-lottery filing deadlines ensures that a date certain exists when it can close the door on mutually-exclusive applications and that this position is substantiated by the Commission's Public Notice, *"Overruling of Caldwell Television Associates, Ltd.,"* FCC 85-534, 58 Rad. Reg. 2d (P&F) 1706 (1985).[2] On the other hand, Farley asserts that once the lottery has been conducted, lenient post-lottery filing deadlines expedite service to the public by eliminating the need for a second lottery. In support of this position distinguishing the treatment of pre-lottery filing deadlines from post-lottery deadlines, Farley relies on *Armstrong Telephone Company*, 3 FCC Rcd 1665 (1988). In that case, the Commission affirmed the grant of a waiver by the Chief of the Common Carrier Bureau to the sole cellular applicant in the Charleston, West Virginia MSA who had failed to file a firm financial commitment showing within the 30-day period required by our rules. In affirming the Bureau's decision to grant a waiver, the Commission agreed with the Bureau's finding that the public interest of expeditiously providing service to the public outweighed the benifits to be achieved by strict enforcement of the rules. Farley argues that the same considerations which compelled granting a waiver of the time deadline in *Armstrong* apply with equal force to his application; namely, that the reinstatement of his application will obviate the need for another lottery in this market and expedite the initiation of non-wireline service to the public.

4. Finally, Farley contends that dismissal of his application for not adhering to the post-lottery filing deadlines is an abuse of discretion. Farley asserts that the Commission can enforce any given deadline strictly only if it does so consistently and only if it gives advance warning before replacing a policy of flexibility with a policy of strict enforcement. *Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235 (D.C. Cir. 1985); *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985); *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1560 (D.C. Cir. 1987). Farley contends that because the Commission has had an existing policy of leniency regarding extensions of time for post-lottery filings and gave no notice it would be changing this policy, the Commission cannot arbitrarily use his application to announce a new policy while applying the new stricter policy to him.

II. DISCUSSION

5. Section 22.923(b)(2), applicable to RSA lottery winners, provides that "[w]ithin seven (7) days of the release date of the public notice announcing the lottery results, the applicant selected first in the lottery shall submit the original and two hard copies of the application . . . ." [3] Following our announcement that Farley had been selected first in the non-wireline cellular lottery for the Beaver market, Farley timely submitted the paper application for the Juab market, which does not match the microfiche application initially filed.

6. Our analysis as to whether to grant Farley's waiver request begins with a description of the policies served by Section 22.923(b)(2) of the Commission's Rules.[4] In the *First Report and Order, Amendment of the Commission's Rules for Rural Cellular Service*, CC Docket No. 85-388, 60 Rad. Reg. 2d (P&F) 1029 (1986), the Commission determined that the public interest would be served by generally adhering to the application procedures prescribed for MSA markets 121-305. The Commission stated that adoption of these rules would ensure that cellular service was provided in rural America on an expedited basis. *Id.* at 1040-41. Furthermore, in *Cellular Lottery Reconsideration Order*, 101 FCC 2d 577, 604 (1985), the Commission indicated that these lottery selection procedures were being adopted to streamline the licensing process by reducing the incentive for applicants to file "sham" or speculative applications.

7. We believe that a waiver in this case will "not undermine the polic[ies], served by the rule," and will, in fact, further those policies. *See WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *see also WITN - TV v. FCC*, 849 F.2d 1521, 1525 (D.C. Cir. 1988). In filing its application for a construction permit for the Beaver market, Farley timely filed with the Commission two microfiche copies of the application, one of which was labeled "original," accompanied by a properly certified transmittal sheet with an original signature and the filing fee. Thus, Farley complied with our initial filing requirements. Moreover, when Farley was selected as the lottery winner in the Beaver market, and was required to submit the original paper application for this market within seven days, he attempted to comply with our rules. However, due to what he states was an inadvertent error, Farley filed the paper application for the Juab market, instead of the Beaver market. In any event, once Farley discovered the error, he withdrew the earlier filing, requested an extension of time to file the correct application and filed the original paper application for the Beaver market, with the Commission three days late. Given that Farley has complied with our initial filing requirements, and only a brief delay occurred in receiving the correct original application, granting Farley's waiver request and accepting the late-filed original paper application does not materially hinder our processing of his application. Furthermore, reinstatement of the Farley application will obviate the need for another lottery.

8. Moreover, granting Farley's request for an extension of time to file his original paper application is consistent with the MSD's policy of granting requests for extensions of time for filing 1.65 amendments and other post-lottery filings. While we emphasize the need to observe procedural requirements, we recognize that excessive rigidity in applying the deadlines for post-lottery filings is not in the public interest. Accordingly, we believe that granting Farley's waiver request and reinstating the application fully accomplishes the rule's purpose of ensuring that service to the public is provided expeditiously.

9. In view of the foregoing, we believe the public interest would not be served by inflexibly applying our deadline rules for submitting the paper application. It would be unduly harsh to dismiss the application in the particular circumstances of this case. Therefore, Farley's request for a waiver of the seven-day post-lottery filing deadline for submission of the correct original paper application is granted. Our grant of a waiver in this case will not undermine the policies served by the rule section in question and will not cause processing delays.

10. Accordingly, IT IS ORDERED, That the Petition for Reconsideration and Reinstatement filed by Fred Farley IS GRANTED.

11. IT IS FURTHER ORDERED, that the application of Fred Farley, File No. 10110-CL-P676-A-88 IS REINSTATED *nunc pro tunc*.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] To support his claim that post-lottery filing deadlines are routinely waived, Farley provides copies of three public notices wherein the Commission granted cellular applicants in the MSA markets extensions of time to file their financial data. *See* Public Notice, Report No. CL-87-138 (released January 20, 1987); Public Notice, Report No. CL-87-164 (released February 6, 1987); and Public Notice, Report No. CL-87-168 (released February 11, 1987).

[2] By this notice, the Commission overruled prospectively its decision in *Caldwell Television Associates, Ltd.*, 53 Rad. Reg. 2d (P&F) 1686 (1983), where the Commission had waived a filing deadline for a broadcast applicant. The Commision stated that henceforth, applicants seeking waiver of Commission application filing deadlines would be required, without exception, to demonstrate unusual or compelling circumstances.

[3] *See Further Order on Reconsideration*, CC Docket 85-388, 64 Rad. Reg. 2d (P&F) 1630 (released May 18, 1988).

[4] Section 22.19 of the Commission's Rules specifies that one of two alternative showings must be made to justify a waiver. First, the applicant requesting the waiver may show "that the underlying purpose of the rule will not be served, or would be frustrated, by its application in the particular case, and grant of the waiver is otherwise in the public interest. Or, an applicant may show "that the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to public interest.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 5, 1989

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NYNEX'S PLAN TO PROVIDE COMPARABLY EFFICIENT INTERCONNECTION TO PROVIDERS OF ENHANCED PROTOCOL PROCESSING SERVICE

On May 17, 1989, New England Telephone and Telegraph Company and New York Telephone Company (NYNEX) filed a plan to provide comparably efficient interconnection (CEI) to providers of enhanced protocol processing service on an unseparated basis. NYNEX proposes to offer a variety of enhanced protocol processing services in connection with 4 different classes of underlying basic network services: (1) Exchange Telephone Services; (2) Private Line Services; (3) INFOPATH Packet Switching Service; and (4) Central Office Local Area Network services. NYNEX also proposes to engage in joint marketing of enhanced protocol processing with its INFOPATH service for asynchronous to X.25 and X.75 as well as the various protocols listed in its plan. NYNEX notes that in the future, it may expand its offering of protocols as new protocols become available.

As required in the Computer III proceeding (*Phase I Order*, 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, 3 FCC Rcd 1135 (1988)), the Commission must approve the CEI plan before NYNEX can begin implementing the proposed service. However, NYNEX states that its plan does not raise any new substantive issues and that the services it proposes to offer are essentially the same as those services offered by Bell Atlantic in its CEI plan for protocol processing, which the Commission has approved (4 FCC Rcd 2744 (1989)).

According to NYNEX, it will account for the joint and common costs of the gateway service pursuant to its Part 32 cost allocation manual. NYNEX also describes its plans for complying with the other Computer III nonstructural safeguards governing the use of customer proprietary network information, nondiscrimination reporting and nondiscriminatory provisioning, and disclosure of network information.

Interested parties should file comments on this plan by **June 23, 1989,** and reply comments by **July 7, 1989,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of NYNEX's plan can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 2, 1989

OPPOSITIONS TO PETITIONS FOR RECONSIDERATION IN THE MATTER OF ANNUAL 1989 ACCESS TARIFF FILINGS; CONSOLIDATION OF PLEADING CYCLE

On March 22, 1989, the Common Carrier Bureau released an Order concerning the 1989 Annual Access Tariff Filings made by local exchange carriers. 1989 Annual Access Tariff Filings, Memorandum Opinion and Order, DA 89-337, released March 22, 1989. Several parties filed petitions for reconsideration of this Order on April 24, 1989. However, Nevada Bell and Pacific Bell filed their petitions for reconsideration on April 21, 1989.

The Bureau believes it is advisable for parties to consolidate their oppositions to these petitions for reconsideration, and to use the April 24 filing date to compute the deadlines for submitting such oppositions. Therefore, all oppositions to the petitions for reconsideration filed in this proceeding are due May 9, 1989.

For further information contact Ann Stevens, Tariff Division, at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 23, 1989

NATIONAL ASSOCATION OF REGULATORY UTILITY COMMISSIONERS FILES PETITION FOR RULE MAKING TO ADDRESS THE RATES, PRACTICES AND APPROPRIATE REGULATORY TREATMENT OF OPERATOR SERVICE PROVIDERS

The National Association of Regulatory Utility Commissioners (NARUC) has filed a petition requesting that we initiate a Rule Making proceeding to address the practices, policies and appropriate regulatory treatment of operator service providers. NARUC cites concern over the level of complaints received by state regulatory commissions and the FCC regarding the rates and practices of operator service providers and urges the FCC to adopt specific guidelines which it contends are necessary to adequately protect consumers.

In its petition, NARUC expresses general approval of the Common Carrier Bureau's (Bureau) recent Order resolving a complaint filed against five companies in the OSP industry, *Telecommunications Research and Action Center v. Central Corporation et al.*, 4 FCC Rcd 2157 (1989), *application for review pending*, but argues that the Commission should broaden the scope of its inquiry into AOS practices beyond that encompassed by the TRAC/CA complaint proceeding in order to consider the viewpoints held by all concerned parties, many of whom did not participate in that proceeding. At least part of its concern appears to stem from the fact that in its narrowest sense, the Bureau Order may apply only to the five named defendants. NARUC states that, in its view, issues regarding the rate levels of operator service providers and issues relating to findings in the Competitive Carrier Rule Making Proceeding[1] need to be considered in a Rule Making context. NARUC argues that in such context, the Commission can consider all aspects of rates, practices and policies of companies in the industry including AT&T and establish an appropriate regulatory framework based on comments from a wide range of interested parties. Therefore, NARUC urges the Commission to open a Rule Making proceeding and consider adopting minimum regulatory guidelines applicable to OSP companies in the following areas: (1) certification requirements, (2) rate levels, (3) customer notification, (4) billing practices, (5) quality of service complaints and (6) customer choice.

Interested parties may file comments concerning the NARUC petition within 30 days of the release of this Public Notice. Reply comments should be filed within 15 days thereafter. To file formally in this proceeding, participants must file an original and five copies of all comments and reply comments. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments will be given the same consideration, regardless of the number of copies submitted. All comments and replies should refer to RM-6767. Copies of the petition and any subsequently filed documents in this matter may be obtained from International Transcription Services, 2100 M Street, N.W., Suite 140, Washington, D.C. 20036. (202) 857-3800. NARUC's petition and other documents will also be available for review and copying in the Commission's Dockets Reference Room (Room 239), 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Thomas D. Wyatt at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

FOOTNOTE

[1] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization: Notice of Inquiry and Proposed Rulemaking*, 77 FCC 2d 308 (1979); *First Report and Order*, 85 FCC 2d 1 (1980); *Further Notice of Proposed Rulemaking*, 85 FCC 2d 445 (1981); *Second Report and Order*, 91 FCC 2d 59 (1982), *recon. denied*, 93 FCC 2d 590 (1983); *Fourth Report and Order*, 95 FCC 2d 554 (1983); *Fifth Report and Order*, 98 FCC 2d 1191 (1984); *Sixth Report and Order*, 99 DCC 2d 1020, *vacated and remanded sub nom., MCI v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-77

In re

Transfers of Control of Certain
Licensed Non-Stock Entities

ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE COMMENTS

Adopted: May 24, 1989; Released: May 25, 1989

By the Chief, Mass Media Bureau:

1. On March 16, 1989, the Commission adopted a *Notice of Inquiry* (*Notice*), 4 FCC Rcd 3403 (1989), in the above-captioned proceeding in order to establish a record upon which to formulate guidelines for identifying when transfers of control of certain types of licensed non-stock entities are deemed to occur, and to clarify the procedures that should be followed in applying for Commission approval of such transfers. The *Notice* proposed that the general framework used in connection with "traditional" stock corporations be adapted for use with respect to those non-stock entities that are directed by a governing board and operate pursuant to a written organizational document. The Commission identified three basic types of non-stock entities that appear to possess these characteristics -- membership organizations, certain governmental bodies and organizations with self-perpetuating boards -- and requested, *inter alia*, comment on whether our assumptions about the structure and operation of these entities are correct. It established a deadline of June 1, 1989, for filing comments, and a deadline of June 16, 1989, for filing reply comments.

2. On May 8, 1989, National Public Radio, National Federation of Community Broadcasters, National Association of Public Television Stations and the Corporation for Public Broadcasting filed a joint "Motion for Extension of Time to File Comments" requesting a 45-day extension of time. They request this extension of time in order to consult further with their members and funding recipients and to analyze the information gained from them. The motion is unopposed.

3. As set forth in Section 1.46 of the Commission's Rules, 47 C.F.R. § 1.46, it is our policy that extensions of time not be routinely granted. In order to evaluate the proposals made in the *Notice*, however, we are depending upon interested parties to provide an assessment of the generalizations we have made regarding the three types of non-stock entities mentioned above. Petitioners, which collectively represent or have access to information about a large number of licensees that may be affected by our action in this proceeding, are in a particularly good position to provide such an assessment, and they indicate that they are in the process of surveying and analyzing the structure and operation of the stations with which they are connected. We recognize that this process may take some time, and that the requested 45-day extension may greatly increase the quality and scope of the data that can be instrumental in resolving the issues raised in the *Notice*. We will therefore grant the motion and extend the deadline for filing comments to July 17, 1989, and the deadline for filing replies to July 31, 1989.

4. Accordingly, IT IS ORDERED that the Motion for Extension of Time to File Comments, filed by National Public Radio, National Federation of Community Broadcasters, National Association of Public Television Stations and the Corporation for Public Broadcasting, IS GRANTED.

5. IT IS THEREFORE ORDERED that the time for filing comments and reply comments in this proceeding ARE EXTENDED to **July 17, 1989,** and **July 31, 1989,** respectively.

6. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, and 1.46 of the Commission's Rules.

7. For further information concerning this proceeding, contact David E. Horowitz, Policy and Rules Division, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION:

Alex D. Felker
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-421

In re Applications of

Robert L. Purcell, d/b/a BIG BAY BROADCASTING	File No. BPH-851028MI
CWA BROADCASTING, INC.	File No. BPH-851028MJ
Philip & Eleanor D'Adamo, d/b/a D'ADAMO COMMUNICATIONS	File No. BPH-851028ML

For Construction Permit for a New FM Broadcast Station at Cambridge, Maryland

Appearances

Thomas W. Fletcher on behalf of Robert L. Purcell d/b/a Big Bay Broadcasting; *Alfred C. Cordon* and *Dennis J. Kelly* on behalf of CWA Broadcasting, Inc.; *Donald E. Martin* on behalf of D'Adamo Communications.

DECISION

Adopted: May 22, 1989; Released: June 6, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Chairman MARINO:

1. Three applicants remain in this comparative hearing to select the best qualified broadcaster for a new FM station in Cambridge, Maryland. CWA Broadcasting Inc. (CWA), was found to be the superior comparative applicant in the *Initial Decision* (I.D.) of Administrative Law Judge Edward J. Kuhlmann, 3 FCC Rcd 6481, 6488 (1988). Briefs and exceptions were filed by the two unsuccessful applicants. D'Adamo Communications (D'Adamo) claims that the Administrative Law Judge (ALJ) erred in denying its petition for leave to amend to a new antenna site which would have mooted an outstanding disqualifying air hazard issue. On the other hand, Big Bay Broadcasting (Big Bay) argues that the ALJ should have dismissed CWA's application because CWA did not agree promptly to share the cost of an engineering exhibit with Big Bay. Based on our review of the record in the light shed by the briefs and oral argument held March 17, 1989, we will affirm the I.D. for the reasons set out below.

2. *Background:* When the applications in this case were designated for hearing on September 17, 1987, an issue was specified against D'Adamo to determine whether "the tower height and location proposed by D'Adamo would constitute a hazard to air navigation." Shortly before its written evidence was due on this issue D'Adamo sought to amend to a different site. After setting forth the facts in some detail, I.D., paras. 3-18, the ALJ found that D'Adamo had not demonstrated "good cause" for a belated amendment filed three days before the written testimony was due, and therefore resolved the previously designated air hazard issue against D'Adamo. I.D., paras. 44-45. With respect to the second argument, Big Bay had sought dismissal of CWA's application because CWA's request for a "couple hours" to decide whether to join in Big Bay's engineering exhibit "silently stretched to over twenty-four hours without commitment" to pay for the exhibit. Big Bay Br. at 6. Given the circumstances in that case, I.D., paras. 38-41, the ALJ refused to dismiss the application because: "[i]t cannot be concluded that CWA was either unwilling to prosecute [its application] or that it would not pay its share of the joint exhibit." I.D., para. 41.

3. A broadcast applicant which is found to be basically unqualified is not entitled to comparative consideration. *See Louis Adelman*, 29 FCC 2d 1223 (1960), *aff'd sub nom. Guinan v. FCC*, 297 F.2d 782 (D.C. Cir. 1961). Thus, we must first decide (a) whether D'Adamo should have been permitted to amend its application to specify a new transmitter site; and (b) whether CWA's application should have been dismissed because of its alleged failure to prosecute by failing to make prompt arrangements for a joint engineering exhibit.

4. *D'Adamo's Amendment:* As noted above, an air hazard issue was specified in the *Hearing Designation Order, (HDO)* 2 FCC Rcd 5915, released September 17, 1987. Some seven months later, on April 8, 1988, D'Adamo petitioned for leave to amend to a new transmitter site and thereby resolve the air hazard issue. In its petition, D'Adamo recognized that under the controlling Commission Rule, 47 CFR 73.3522(b), an applicant seeking to amend after designation for hearing must make a "good cause" showing for a late-filed amendment.

5. In support of this showing, D'Adamo asserted in its petition (at pp. 1-3) that it had acted with due diligence, notwithstanding the seven month delay, because it "has been in contact with the FAA at various times since the release of the HDO [September 17, 1987] in an effort to learn the state of the FAA's study of its proposal and to encourage the expeditious issuance of a determination of no hazard." D'Adamo further claimed that: "[d]espite these efforts, no written determination of no hazard [was] received from the FAA." In a footnote, D'Adamo asserted that its counsel had "been advised that the FAA may soon issue an indication as to a lower height that it may be willing to negotiate as acceptable at D'Adamo's proposed location. But to date [April 8, 1988], neither counsel nor D'Adamo [has] received this indication in writing." Accordingly, D'Adamo urged that because of the FAA's delay, "it be permitted to amend to a usable site without further waiting for FAA action." Pet. at 3.

6. In response, competing applicants argued that the analysis of due diligence begins not with the designation of an application for hearing, but from the original filing of the application; *more specifically*, from the time an applicant was or should have been aware of the issue

requiring the amendment. *See, e.g., Royce International Broadcasting Co. v. FCC*, 820 F.2d 1332 (D.C. Cir. 1987), and *Horizon Broadcasting Inc.*, 103 FCC 2d 656 (Rev. Bd. 1986). And here, more than two years had passed since October 24, 1985 when D'Adamo originally proposed its 343 foot transmitter tower site only three miles from the Cambridge airport and requested FAA approval. Additionally, they argued that D'Adamo had failed to document its "various" contacts with the FAA either before or after its application was designated for hearing by the FCC in September 1987.

7. Documents discovered from the FAA files and submitted to the FCC by D'Adamo's competitor established that on April 10, 1986, the FAA had notified D'Adamo that its proposed construction exceeded "Part 77 obstruction standards" and would require further study. On that same date, the FAA also informed D'Adamo that: "[I]f the proposed structure were reduced in height to not exceed 207 ft. above ground level (200 ft. above sea level) it would not exceed Part 77 obstruction standards." Eastern Shore Motion to Enlarge Issues, filed May 5, 1988, at Exh. 3. Other FAA documents established that the D'Adamo aeronautical study "was terminated on September 19, 1986" and that "[t]he reason for termination was no response to negotiated height of 220 feet AMSL." *Id.*, at Exh. 5.

8. At the FCC hearing, the presiding ALJ attempted to discover from D'Adamo whether it had heard from the FAA. We quote from his findings which are fully supported by the record:

> [A]n attempt was made on April 25, 1988, at the hearing, to clarify whether D'Adamo had ever heard from the FAA about its site. D'Adamo's counsel said that neither he nor Mr. D'Adamo had ever heard from the FAA. Tr. 188. Counsel worded his answer so carefully that the presiding officer concluded that maybe he should have asked whether Edward Perry, who prepared D'Adamo's engineering, had been notified by the FAA. Counsel then conceded that the FAA had notified Mr. Perry and, when D'Adamo was asked to produce the FAA's notification, counsel said Mr. Perry would have to send it to him. Tr. 493. Counsel represented that when he wrote the petition for leave to amend, he did not know that Mr. Perry had heard from the FAA. Tr. 188.

I.D., at para. 8.

9. Subsequently, in a pleading filed May 16, 1988, D'Adamo informed the ALJ that in January of 1988 its counsel had called the FAA and was told that its original 1985 request had been terminated in 1986 and that a new request could be made. D'Adamo claimed that on January 29, 1988, it made a new request at the lower height of 220 feet, that this request was not received by the FAA, and that another request was made on March 15, which the FAA acknowledged receiving on April 4, 1988, I.D., para. 12, and approved in less than 45 days. *Id.*, para. 17. The ALJ faulted D'Adamo for pursuing different proposals before the FAA and FCC in April 1988: a reduced 220 feet antenna at the original site before the FAA; and a completely new site before the FCC. Neither agency was candidly informed about D'Adamo's ploys.

10. In still a further pleading filed May 23, 1988, Philip D'Adamo declared that he knew nothing about the 1986 FAA notice since he was not personally notified. On the other hand, Edward Perry acknowledged receiving the notice and claimed that he had requested a further FAA study in 1986. I.D., para. 13.

11. After assuring himself that a full record had been developed on this question, the ALJ found that D'Adamo had not acted with due diligence to gain FAA approval either after the original filing in October of 1985, I.D., para. 15, or following designation for hearing in September of 1987, I.D., para. 16. The equitable reasons which D'Adamo had advanced in April of 1988 to justify its amendment (para. 5 above) were not supported by the record. On the contrary, both the documentary evidence and D'Adamo's belated and reluctant admissions established that: "[t]he FAA is in no respect to blame" for the delays. I.D., para. 17. The true facts which came to light not from D'Adamo's showing, but from the FAA documents submitted by another applicant, in the ALJ's view, raised "a serious issue about whether D'Adamo's claims about its tower proposal were truthful." I.D., para. 17.

12. In essence, D'Adamo's amendment was denied because it had failed to demonstrate "due diligence" during the two years prior to designation for hearing or the seven months after designation. Moreover, its showing gave rise to a basic character question regarding the veracity and accuracy of D'Adamo's representations. This new issue would have required a further hearing, disrupted the proceeding, and caused unfair prejudice to the other parties. *See generally Erwin O'Connor Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970) and the six element test for good cause: (1) due diligence; (2) amendment not required by voluntary act of applicant; (3) no modification or addition of issues or parties; (4) no disruption of orderly conduct of the hearing; (5) other parties not unfairly prejudiced; and (6) no comparative advantage.

13. D'Adamo's brief and exceptions do not challenge the detailed factual findings set out in the I.D. and summarized above. Its brief concedes that the FAA did in fact notify its consulting engineer in April of 1986, but the applicant rests its case on the contention that: "Mr. Perry did not report any of these post-filing activities to the applicant at the time. Therefore, none of this was actually known at the time by D'Adamo's principals." Br. at 6. However, the record reflects that Mr. D'Adamo is an experienced broadcast owner (D'Adamo Exh. 2, pp. 1-4); and according to the applicant's own argument, he failed for nearly two years to ask his consulting engineer about the status of the critical FAA study of its 343 foot antenna located only three miles from a local airport. We agree with the ALJ's conclusion that these facts do not demonstrate "due diligence."

14. Also fatal to D'Adamo's case is the concession in its brief that: "[f]ollowing designation of the air hazard issue, D'Adamo's principals and its counsel learned" that the FAA had rejected its original proposal, but "would most likely have approved a tower at that location reduced to 220 feet." Br. at 6. These decisional facts were not reported to the FCC. *See* 47 CFR 1.65. Not until January 29, 1988 (at the earliest) or March 15, 1988 (at the latest) did D'Adamo request FAA approval of the reduced tower. Again, the true status of D'Adamo's proposal at the FAA was not reported to the FCC in April of 1988. Rather, the FAA was unjustifiably blamed for D'Adamo's delays, and the FCC was asked to approve a completely different

antenna site at precisely the same time the FAA was being asked to approve the original site at reduced height. We agree with the ALJ that D'Adamo's conduct after the FCC's designation of the air hazard issue demonstrates a further lack of due diligence, and that if D'Adamo's application had not been denied on the air hazard grounds it would have had to be designated for further hearing on a misrepresentation or lack of candor issue. In light of our disposition on the air hazard issue, it is unnecessary to reach the exceptions relating to D'Adamo's disqualification for misrepresentation or lack of candor relating to D'Adamo's acquisition of a weekly newspaper, or its failure to introduce evidence relating to its signal coverage.

15. *CWA's Engineering Exhibit:* Significant differences, if any, in the proposed coverage of the different applicants were to be considered under the standard comparative issue, *HDO*, *supra*. In a pre-hearing order the presiding ALJ directed that the parties were to file their preliminary engineering materials concerning this matter on March 28, 1988. *Order*, FCC 87M-3152, released December 4, 1987.

16. On March 24, 1988, counsel for CWA contacted counsel for Big Bay to explore the possibility of joining in Big Bay's engineering showing. CWA's counsel requested a "couple hours" to consider Big Bay's financial terms. I.D., para. 39. Big Bay argues in its brief that: "[t]he requested 'couple hours' for reflection silently stretched to over twenty-four hours without commitment . . . and Big Bay had no choice but to go it alone . . . ." Br. at 6. Big Bay then filed a motion to dismiss CWA's application because CWA did not timely agree to share payment for the preparation of the joint engineering by a consulting engineer who also was an applicant in Big Bay. I.D., paras. 38-39.

17. After sorting out the conflicting contentions, the ALJ found that Big Bay had given CWA less than 24 hours to pay for its portion of the engineering exhibit. I.D., paras. 38-41. CWA's brief delay in accepting Big Bay's terms, the ALJ found, did not demonstrate a serious failure to prosecute which would warrant a dismissal of its application. The ALJ reasoned that:

> [o]rdinarily, a consulting engineer is free to set payment terms in any manner he or she believes acceptable. But in this case the consultant had everything to gain by setting terms which could not be met since he was also an applicant. When an engineer who is preparing a joint exhibit also has a stake in the outcome . . . the Commission is free to review the terms under which applicants were excluded to determine whether the consultant acted fairly and whether it could be concluded that nonpayment exhibits an unwillingness to prosecute. A demand for payment in less than 24 hours does not appear fair and CWA's response in less than a day that it would participate, which was two weeks before the exchange date, appears reasonable. It cannot be concluded that CWA was either unwilling to prosecute or that it would not pay its share. For these reasons, the petition to dismiss will be denied and CWA's coverage proposal will be compared.

I.D., at para. 41.

18. Both the Commission and the Review Board have held that the presiding officer has reasonable discretion to guide the course of the hearing and may dismiss applications where there has been a serious default in critical prehearing requirements which disrupts that other applicant's preparation for hearing. *See Albert E. Gary*, FCC 89R-28, released May 18, 1989, and cases cited therein. A dismissal for failure to prosecute is a drastic remedy and the ALJ must therefore carefully balance all of the competing interests. *Id.* Here, we will affirm the ALJ's refusal to dismiss because we agree that the few hours which CWA delayed in accepting Big Bay's terms in fact did not disrupt either pre-hearing or hearing preparations.

19. Finally, Big Bay claims that CWA should not have been awarded decisive comparative integration credit because CWA did not comply with all the formalities of Maryland Corporation Law; *i.e.*, its stock certificates were not properly issued. Br. at 8-9. The record establishes that CWA is a corporation with only one stockholder, Charles W. Adams, Jr. Mr. Adams holds all of the corporate offices and proposes to work as the station's general manager full-time, 40 hours per week. I.D., para. 29. The record also establishes that Adams paid into CWA between $15,000 and $20,000 (Tr. 107) and that CWA was formed long before the "B" cut-off date. Tr. 59.

20. Given the record evidence, there is no question that Adams is the only true and actual owner of CWA, and the ALJ was fully justified in awarding a decisive 100% integration credit, enhanced by minority ownership, and past civic activities within the service area. *See generally Religious Broadcasting Network*, 3 FCC Rcd 4085, 4088-4089 (Rev. Bd. 1988)(full integration credit awarded in absence of reliable evidence of sham). Big Bay's proposal received 100% integration credit, but it was not comparably enhanced. Thus, we affirm the ALJ's conclusion that "CWA [was] . . . substantially preferred because of the qualitative attributes its principal provides in comparison to Big Bay." I.D., paras. 53, 54.

21. ACCORDINGLY, IT IS ORDERED, That the applications of Robert L. Purcell d/b/a Big Bay Broadcasting, and Philip & Eleanor D'Adamo d/b/a D'Adamo Communications ARE DENIED; and that the application of CWA Broadcasting, Inc., (File No. BPH-851028MJ), IS GRANTED; and

22. IT IS FURTHER ORDERED, That the motion for late acceptance, filed December 22, 1988 by Big Bay Broadcasting IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RKO GENERAL, INC.(WAXY-FM) Fort Lauderdale, Florida For Renewal of License	**MM DOCKET NO. 84-1112** File No. BRH-781002WR
ADWAVE COMPANY	**MM DOCKET NO. 84-1113** File No. BPH-830510AL
SOUTH JERSEY RADIO, INC.	**MM DOCKET NO. 84-1114** File No. BPH-830511AK
COZZIN COMMUNICATION CORPORATION	**MM DOCKET NO. 84-1116** File No. BPH-830512AW
Rosemarie A. Reardon d/b/a LAUDERSEA BROADCASTING COMPANY For Construction Permit for a New FM station at Ft. Lauderdale, Florida	**MM DOCKET NO. 84-1118** File No. BPH-830512CP

Appearances

Lewis I. Cohen, Esquire, on behalf of Adwave Company; *Dennis J. Kelly, Esquire* on behalf of South Jersey Radio, Inc.; *Ben C. Fisher, Esquire* on behalf of Cozzin Communication Corporation; *Margot Polivy, Esquire* on behalf of Rosemarie A. Reardon, d/b/a Laudersea Broadcasting Company; and *Larry A. Miller, Esquire* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: May 24, 1989; Released: June 6, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN. Board Member BLUMENTHAL concurring in part and dissenting in part.

Board Member ESBENSEN:

1. By *Hearing Designation Order*, FCC 85-541, released December 6, 1984 (HDO), the Commission designated for comparative hearing the license renewal application of RKO General, Inc.(RKO), for FM broadcast station WAXY-FM, Fort Lauderdale, Florida, and various mutually exclusive applications to operate on the same frequency. The following mutually exclusive applicants remain in this proceeding: RKO General, Inc.(RKO); Adwave Company (Adwave); South Jersey Radio, Inc. (South Jersey); Cozzin Communication Corporation (Cozzin); and Rosemarie A. Reardon, d/b/a Laudersea Broadcasting Company (Laudersea).

2. In reviewing these proceedings to date, the Commission, in its *Memorandum Opinion and Order*, 4 FCC Rcd 1532 (1989), noted that there were originally nine comparative renewal proceedings in which RKO's renewal applications for 13 co-owned stations were opposed by competing applicants for construction permits, and that the Commission's Administrative Law Judges "in the various comparative renewal proceedings should conduct hearings to determine the relative qualifications of the competing applicants and to issue partial initial decisions ranking these applicants. *RKO General, Inc. (WFYR-FM)*, 100 FCC 2d 464, 467-68 (1985)." The Commission then directed (*id.*, at para. 10)[1]:

> the parties seeking review of the partial initial decisions to file their exceptions with the Review Board, which regularly considers matters of this nature, within 30 days after the release date of this memorandum opinion and order . . . . After the Board has received exceptions and replies, it shall, with highest priority, proceed to review the ALJ's ranking of the applicants and issue decisions denying those applicants not ranking first.

3. Thus, before us at this juncture are the *Partial Initial Decision*, 2 FCC Rcd 3348 (1987)(I.D.) of Administrative Law Judge Joseph Stirmer (ALJ); the *Contingent Initial Decision* of Administrative Law Judge Walter C. Miller, FCC 86D-47, released July 23, 1986 (*Boston I.D.*)(insofar as the *Boston I.D.* relates to Cozzin); the exceptions (filed March 16, 1989 by Adwave, Laudersea, and Cozzin); and replies (filed April 7, 1989 by Adwave, Laudersea, South Jersey, and the Commission's Mass Media Bureau). Having heard oral argument on April 28, 1989, and reviewed the transcripts and documents in the proceeding below, we affirm the ALJ, except as modified herein, and rank South Jersey's application (as among the competing applicants) as first. All other remaining applicants are unqualified to be licensees of the Commission.

BACKGROUND

4. In addition to the standard comparative issue, by *Memorandum Opinion and Order*, FCC 85M-3484, released September 6, 1985, the Presiding Judge specified the following issues against Laudersea:

> (a) To determine the cost estimates for prosecution, construction and operation of the facility proposed by Laudersea and whether its available bank loan commitment is sufficient to render that applicant financially qualified.
>
> (b) To determine whether Rosemarie A. Reardon, d/b/a Laudersea Broadcasting Company, either misrepresented facts, was lacking in candor, or was grossly negligent in certifying that she was financially qualified and, if so, the effect thereof on her basic and/or comparative qualifications to be a Commission licensee.

5. By *Memorandum Opinion and Order*, FCC 85M-3835, released October 2, 1985, the ALJ specified the following issue against Adwave:

> To determine whether Adwave or Mr. George Gardner misrepresented facts or was lacking in candor in making its divestiture commitment to the Commission and if so, the effect thereof on the applicant's basic and/or comparative qualifications.

6. In addition to the foregoing issues, and as a result of the addition of issues against Cozzin in the RKO Boston proceeding (*see RKO General, Inc. (WRKO/WROR)*, FCC 85M-890, released March 1, 1985), the Presiding Judge ruled that the same issues would be specified herein, but that trial of such issues would be held in the Boston proceeding, with the findings and conclusions controlling in this proceeding (*see Order*, FCC 85M-1076, released March 15, 1985; 2 FCC Rcd at 3348, 3349). The issues added with respect to Cozzin in the Boston proceeding were as follows:

> To determine whether Joseph Zingale misrepresented the facts to, or lacked candor with the Commission when he executed the signatures of his wife and children on 46 LPTV applications filed with the Commission, and if so, what effect those misrepresentations have on Zingale's basic or comparative qualifications to be a Commission licensee;
>
> To determine whether Joseph Zingale is the real party in interest in those 46 LPTV applications, and misrepresented his ownership status for the purpose of circumventing 47 CFR 73.3513, 73.3518, 73.3520 and 73.3521, thereby abusing the Commission's processes, and if so, what effect that abuse has on Zingale's basic or comparative qualifications to be a Commission licensee.

ADWAVE

7. Adwave is a Florida corporation, wholly owned and controlled by George F. Gardner, its president, a director and 100% stockholder (Tr. 202; Adwave Ex. 1 at 1). Gardner is also president, treasurer and a director of Raystay Company (Raystay), which owns and operates cable television systems serving Carlisle, Mount Holly Springs, Boiling Springs, Waynesboro and neighboring areas in Pennsylvania. Raystay is also sole owner of Inwood TV Cable Company, which holds a franchise to operate cable systems being constructed (at the time of the hearing) in Berkley County, West Virginia (Tr. 203-204). The other officers and directors of Raystay are Gardner's wife, Marian Gardner, who is secretary and a director, and Gardner's son, David, who is vice president and a director (Tr. 117, 232-233; Adwave Ex. 5 at 1).

8. Raystay has always been wholly owned by the Gardner family and operates as a family business (Tr. 198, 218). Gardner controls Raystay through his majority stock ownership (Tr. 200; Adwave Ex. 1 at 1). Raystay has two classes of stock: Class A, which is voting, and Class B, which is nonvoting (Tr. 483). Gardner owns 50.1% of the Class A stock of Raystay, while Mrs. Gardner owns 25.9% of the Class A stock. Two of the Gardner children, David and Michael, each own 8% of the Class A stock; the remaining 8% of the Class A stock is held in trust by David Gardner for another of Gardner's children, Jon Gardner. In addition, five of Gardner's children and two of his grandchildren own Class B stock in Raystay (two in trust arrangements with David Gardner as trustee)(Tr. 134; Adwave Ex. 5 at 1-2). The Class B stockholders have no voting control over Raystay (Tr. 511); however the principal equity value of Raystay is in the Class B stock (Tr. 484; 497-498).

9. Additionally, Gardner is president, treasurer, a director and, until 1984, was 100% stockholder of TV Cable of Waynesboro, Inc. (TVCW), which owns and operates cable television facilities serving Washington County, Maryland. As of October 26, 1984, Gardner transferred all the outstanding stock of TVCW to Raystay. Further, until 1984, Gardner was president, a director and 90% stockholder of West Shore Broadcasting Company (WSBC), which owned and operated cable television facilities serving Quincy Township and Franklin County in Pennsylvania (Tr. 206, 207; Adwave Ex. 1 at 1); his son David held the remaining 10% of the stock of WSBC (Tr. 204). On October 22, 1984, Gardner transferred the assets of WSBC to Raystay and subsequently dissolved WSBC (Tr. 204-207, 521; Adwave Ex. 1 at 1).

10. On March 27, 1984, the "B cut-off" date in this proceeding, Gardner amended Adwave's application to claim that (Tr. 489; Adwave Ex. 6 at 1; RKO Ex. 1; emphases added):

> In the event Adwave Company is awarded a construction permit for a new FM broadcast station at Fort Lauderdale, Florida, George F. Gardner and his wife, Marion [sic] Gardner, *will divest themselves of all of the stock they own* in Raystay Company.
>
> In the event Adwave Company is awarded a construction permit for a new FM broadcast station at Fort Lauderdale, Florida, George F. Gardner *will divest himself of all the stock he owns* of TV Cable of Waynesboro, Inc., and West Shore Broadcasting Co.

11. Gardner was aware that divesting of his stock was a factor the Commission would consider in awarding the license; and, after reviewing the applications of other parties to determine how Adwave's application compared with them, Gardner elected to amend his application to include the commitments to divest. In that regard, the following hearing cross-examination colloquy (which occurred *prior* to the time the issues were enlarged against Adwave) is enlightening (Tr. 162-165; emphases added):

> [Counsel]: Mr. Gardner, as of the time your application was filed, do you recall whether or not there was a provision, a representation in that application that you would divest your interest in Raystay?
>
> [Gardner]: I don't believe there was that provision in there.
>
> [Counsel]: Is it true that the commitment to divest was made at the "B" cutoff?
>
> [Gardner]: I am not familiar with the terminology, but I recall Mr. Cohen [Adwave's counsel] explaining to me that there was a time coming up that I would have to make up my mind what I wanted to

have in my application and after that I couldn't change. *I discussed with him all of the various things that the Commission would be looking at. With his assistance, we looked at all the applicants* and I asked, I am repeating myself, I did ask him what the Commission would be looking at. After he explained the various things, the Commission would be looking at, *I then determined that it would be useful for me to amend the application.*

[Counsel]: Just to explain your answer a bit, are you telling me that sometime after the application was filed and after the competing applications were filed, either you or your attorney looked through those applications and determined whether your application stood in a comparative sense to the ones that had been filed for the facility?

[Gardner]: We looked through them together, yes.

[Counsel]: *The purpose was to determine how you stacked up with the other applications?*

[Gardner]: *Precisely.*

[Counsel]: Your attorney informed you in response to your questions that if you were to be comparatively successful, that it would be necessary for you to commit yourself to divest yourself of Raystay? Is that the way it happened?

[Gardner]: No. He explained to me the things that the Commission would be looking at and that was one of them.

[Counsel]: When you say that was one of them, what was one of them?

[Gardner]: Divesting; integration which I had already proposed, and divesting; and we considered minority participation and I finally determined that I would and this did not occur immediately. I discussed it with my wife, I discussed it with my son, David, and did a lot of soul searching and *finally determined I would be willing to divest of my interests in Raystay. I asked my wife if she would be willing to divest and she agreed to do that.*

* * *

[Counsel]: *Isn't it a fact, Mr. Gardner, that the reason you made representations that you would divest yourself of Raystay was to gain a comparative postion in the Fort Lauderdale application?*

[Gardner]: *Yes.*

* * *

[Counsel]: Prior to filing the Fort Lauderdale application and reviewing the other applications, is it not true that you did not intend to divest yourself of Raystay?

[Gardner]: I may have thought about it, but certainly hadn't made any decision on it.

Thus, it is clear that Gardner made the divestiture commitments for the sole purpose of gaining a comparative advantage over the then-existing *eight* other competing applicants (not including RKO) for the frequency occupied by WAXY-FM (Tr. 143-45, 480-481). Gardner discussed the amendment with his communications counsel, who drafted it for his signature (Tr. 508). This amendment was reviewed by Gardner, shown to his wife, and signed by Gardner prior to its filing with the Commission (Tr. 163-164, 508, 518).

12. In the HDO, the Commission (taking Gardner at his word) required, in the event of a grant of the Adwave application, that:

> Prior to the commencement of operation of the station authorized herein, permittee shall certify to the Commission that the principals of Adwave have divested all stock ownership in Raystay Company, TV Cable of Waynesboro, Inc., and West Shore Broadcasting Company.

13. Following the amendment to Adwave's application, in his direct case exhibit (Integration and Diversification Statement, filed February 19, 1985), Gardner *again,* and without reservation, declared:

> In the event that Adwave's application is granted, my wife and I will divest ourselves of all the stock we own in Raystay.

At hearing, Gardner testified that he understood that the condition placed on his application by the Commission with regard to divestiture required him to "take the ownership characteristics of the stock out of [his] hands . . . " (Tr. 165). However, Gardner also testified at hearing (*prior* to enlargement of issues against Adwave) as follows (Tr. 137-140; emphases added):

[Counsel]: *You have no plans to resign as a Director of Raystay, do you ?*

[Gardner]: *No.*

[Counsel]: You represented that if you are successful in this proceeding, that you will divest your stock in Raystay. What does that mean?

[Gardner]: During the deposition there were questions asked on that and I tried to answer them by saying that I had discussed it with my estate attorney and he had said that a trust would be set up. *After the deposition and the questions that I was unable to answer there,* I met with him and we prepared trust

agreements for myself and my wife. They are available for you to look at. What they do, according to my estate attorney, is place our stock in a trust where we would get any dividends that would be declared on the stock, but that we have no right to vote the stock; the trustee has that sole right. I can gift the stock, I can will the stock, but I have no other control over it.

* * *

[Judge Stirmer]: . . . This trust arrangement that you made reference to is what you had in mind when you indicated you would divest yourself of all stock you owned in Raystay?

[Gardner]: Yes.

[Judge Stirmer]: That is what you meant by that?

[Gardner]: Yes. I had discussed with my estate attorney how to go about this. We had said that he would set up a trust arrangement.

[Judge Stirmer]: This is not a situation whereby divesting yourself, you would sell it to a third party and walk away from this company in its entirety?

[Gardner]: That is correct.

[Judge Stirmer]: You have no intention of doing that?

[Gardner]: It is a closely held corporation. My family members own the rest of the stock. There really wouldn't be much of a market for that stock except if all of it was offered for sale. The logical thing to do would be to have the stock transferred to other members of my family which is what the trust is set up to do.

[Judge Stirmer]: You would still retain your position as President and you would still remain as a Director?

[Gardner]: I have not really thought about that. There was no offer made for me to resign in the application.

[Judge Stirmer]: That is not your intention?

[Gardner]: I have not really addressed that. I didn't say that I would and I haven't addressed it.

Gardner also testified that, because of "severe" tax consequences, he would not be willing to sell his stock to a third party (Tr. 139, 225). As a result of the foregoing testimony and representations, South Jersey petitioned (on August 5, 1985) to have the issues against Adwave enlarged concerning Gardner's divestiture commitment. [2] The ALJ obliged by *Memorandum Opinion and Order*, FCC 85M-3835, released October 2, 1985. (*See* para. 5, *supra).*

14. *Proposed Trust Agreement* : As the testimony indicates, Gardner asked his local attorney, William F. Martson, to draft an actual trust agreement only after he was unable to answer questions about the trust arrangement in his April 1985 deposition. Martson has represented Gardner, as his business counsel, since approximately 1965, and has also represented him on some personal matters. The trust agreement Martson prepared in connection with Adwave was the first such agreement that he had ever prepared for Gardner's Raystay stock. In their initial discussions (and in at least one of which Adwave's communications counsel participated " *in a three-way phone call* " (Tr. 147)), Gardner explained to Martson that he wanted, in addition to divesting himself of control, to avoid tax consequences and retain the right to gift or will the stock. Martson stated that he believed that the trust agreement was written because "divestment of control had to be effected . . . "(Tr. 447).

15. The trust agreement for Mrs. Gardner was not drafted until after Gardner's deposition, and she did not see it until two weeks before the hearing (Tr. 234, 241). Before the draft trust agreement was prepared, she had never seen any statement representing that she must divest herself of her Raystay stock and was not aware that any such statement existed (Tr. 242); however, Mrs. Gardner clearly does not want to sell her shares in Raystay (Tr. 239). Additionally, as noted, Gardner does not intend to divest himself of the Raystay stock if Adwave's application is not granted (Tr. 501), and Gardner does not intend to execute the trust agreement unless he is the successful applicant (Tr. 137-138, 145).

16. The unexecuted trust document (Adwave Ex. 2) prepared by Martson (Tr. 507), contained the following relevant provisions:

(1) Gardner would retain all net income of the trust, payable in quarterly installments;

(2) Gardner would retain the right to "demand" that the "principal of the trust, or any portion of the principal" be paid to third parties;

(3) Gardner would retain the proceeds of any sale;

(4) Gardner would retain veto power over any sale, exchange or other disposition of the capital stock of Raystay;

(5) Gardner would retain the power to transfer the trust corpus either during his life or by will;

(6) Gardner could terminate the trust if he no longer held the WAXY-FM license (Tr. 444-425).

17. In addition, Gardner was the individual who selected the proposed trustee (Martson, his local counsel); the proposed trust agreement does not provide that the trust is irrevocable; moreover, Gardner stated that his divestiture commitment only requires that he remove himself (and his wife) from voting control of Raystay only so long as he owns Adwave and Adwave has the Fort Lauderdale station (Adwave Ex. 6, p. 2). This was Martson's understanding of Gardner's intention when he drafted the proposed trust instrument (Tr. 444-425). Mrs. Gardner's situation is identical to Gardner's, except that

while she also has not executed a trust document, she did, on June 16, 1985, execute a document saying she would sign the trust for her stock "as the same may be required to divest myself of ownership of equity in Raystay . . . " (Adwave Ex. 3, p. 5).

18. *Discussion:* In making his divestiture commitment, it is clear that Gardner never contemplated actually selling his stock, or depriving himself of the non-voting benefits of ownership, such as the right to receive the income and dividends of the Raystay stock; the right to dispose of the stock by gift or will; the corporate positions of president and treasurer, or his position as one of the three directors of Raystay; and veto power over "any sale or exchange or other disposition of the capital stock of Raystay Company." And, like her husband, Marian Gardner has no intention of giving up her position as secretary or director of Raystay in the event of a grant (Tr. 238); she stated that she "had no desire" to sell her Raystay stock (Tr. 239).

19. Gardner recognized that the amendment he filed with the Commission in 1984 said nothing about control (Tr. 490). Gardner admitted that he had read the HDO and the clear, unambiguous language concerning divestiture, but claimed that he had not "noticed" that the divestiture provision referred to ownership rather than control of stock (Tr. 492-493). He could not remember ever informing the Commission, prior to the July 1985 hearing, that he only intended to divest himself of voting rights (Tr. 512). It "did not occur" to Gardner that serving as an officer or director or Raystay had any relation to control of the stock. Gardner is simply of the view that he has made a binding commitment to remove himself from "control" of Raystay for so long as he or his wife own an interest in the station being sought by Adwave. He does not intend to take any action inconsistent with that commitment, "whether or not [he] were otherwise free to do so under the law." (Adwave Ex. 6 at 2.)

20. In its Exceptions, Adwave claims (Exceptions, at 1; emphasis in original):

> In sum, there is no *substantial* evidence that Mr. Gardner interposed a knowingly invalid divestiture commitment for the purpose of deceiving the Commission. To the extent Mr. Gardner's plans are deemed insufficient, there is no evidence that this reflects other than a good faith misunderstanding in an area where Commission policy has been complex and developing.

Additionally, Adwave, in essence, claims that Gardner thought that his divestiture commitment could be fulfilled by giving up the voting rights in the stock; that the contemplated trust was not a sham; that by surrendering voting control, Gardner would have become, in effect, a passive investor such as a limited partner and thus would have satisfied the Commission under the policies on *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984); *recon. granted in part*, 58 RR 2d 604 (1985); *further recon. granted in part*, 1 FCC Rcd 802 (1986).

21. However, the facts regarding the key "misrepresentation/lack of candor" issue against Adwave are not in dispute. On March 27, 1984, the "B cut-off date" in this proceeding, Adwave filed an amendment wherein George Gardner stated that if Adwave is awarded a construction permit, "George F. Gardner and his wife, [Marian] Gardner, *will divest themselves of all of the stock they own* in Raystay Company." Raystay, a family corporation, owns and operates various cable television systems, and the divestiture commitment was made by Gardner to improve his comparative position in this proceeding. The commitment to divest appeared on its face to be unconditional and unequivocal and was repeated in the direct case exhibits offered by Adwave.

22. Despite the unequivocal nature of the divestiture commitment, it was revealed during the course of this proceeding that neither Gardner nor his wife have any intention of divesting themselves of their stock ownership of Raystay. Indeed, Gardner, at no time, had any intention of divesting himself in any meaningful way of his stock ownership or the benefits derived from such ownership. Rather, what Gardner had in mind was a trust arrangement whereby he would divest himself of voting rights to the stock; and, because of the alleged "tax consequences," Gardner did not intend to sell the stock.

23. Not only did the trust arrangement fail to satisfy his divestiture commitment, it permitted Gardner's retention of almost all indicia of ownership, save the right to vote the stock. Thus, the trust arrangement would enable Gardner to receive income from the stock; the right to will or make a gifts of the stock; and the right to approve the sale of the stock. The proposed trust agreement contained no provision making it irrevocable by Gardner. Finally, Gardner appointed his personal attorney as the proposed trustee and intended to retain the management positions of president, treasurer, and a director of Raystay.

24. It is clear that the relinquishment of voting rights in a family corporation, under the terms and conditions contemplated by Gardner, can hardly satisfy the pledge he made in his "B cut-off" amendment that he and his wife would divest themselves of "all of the stock they own in Raystay Company. While Gardner claimed that he did not fully "understand" the meaning of "divest" and that he believed that all the Commission required was a relinquishment of "control," it is, nevertheless, apparent that the divestiture statements made by Gardner spoke in terms of stock ownership, not control. But, even control of Raystay was not going to be meaningfully surrendered by Gardner who, as noted, would retain the position of president, treasurer and a director.

25. The Commission expects representations made in the comparative hearing process to be advanced in good faith. Such representations must not be put forth as a part of "gamesmanship" or for tactical advantage; they must be seriously advanced and seriously regarded in actual operation. *Tidewater Teleradio, Inc.*, 24 RR 653, 657 (1962). And, such divestiture commitments must be unconditional and unequivocal. *WHW Enterprises, Inc.*, 89 FCC 2d 799, 813 (Rev. Bd. 1982), *review denied*, FCC 83-368, released September 13, 1983, *rev'd on other grounds sub nom. WHW Enterprises, Inc. v. FCC*, 753 F. 2d 1132 (D.C. Cir. 1985); *Northern Sun Corporation*, 100 FCC 2d 889, 891 (Rev. Bd. 1985); *KIST Corp.*, 99 FCC 2d 173, 196 (Rev. Bd. 1984); *Vacationland Broadcasting Co.*, 97 FCC 2d 485, 488 (Rev. Bd. 1984), *recon. denied*, 56 RR 2d 1260 (Rev. Bd. 1984), *review denied*, FCC 85-275 (1985); *High Sierra Broadcasting, Inc.*, 96 FCC 2d 243 (Rev. Bd. 1983).

26. Adwave argues that although its representations made in its divestiture pledge for the purpose of gaining a comparative advantage were ultimately found to be unwarranted, that is no basis for finding an intent to deceive,

citing *Tequesta Television, Inc.*, 2 FCC Rcd 7342 (Rev. Bd. 1987).[3] Adwave argues that Gardner made his divestiture commitment in good faith, that it was not inherently unreasonable, and that merely because its divestiture proposal may have been defective, such defect does not warrant disqualification. Moreover, Adwave suggests that if it had truly intended to deceive the Commission, it could have, in essence, "found a better way to do it." However, contrary to the thrust of Adwave's arguments, the Board has held that representations made in the course of a hearing seeking to obtain a comparative advantage can serve as the basis for disqualification of an applicant or licensee. *Mid - Ohio Communications, Inc.*, 104 FCC 2d 572 (Rev. Bd. 1986). Additionally, contrary to Adwave's argument that the state of Commission precedent on the use of trusts to effectuate divestiture commitments is unclear, in *Webster - Baker Broadcasting Co.*, 88 FCC 2d 944 (Rev. Bd. 1981), the Board held that a divestiture commitment could not be premised upon a voting trust that had not been created as of the date for filing amendments as a matter of right, and that such a "vague" proposal was "not the same as divestiture of ownership."

27. Here, it must be concluded that Gardner misrepresented facts or, at a minimum, was lacking in candor when he prepared and submitted his divestiture amendment and hearing exhibits because he had, in actuality, no intention of meaningfully divesting himself of his stock ownership in Raystay. It is patent that this pledge by Gardner was not made in good faith, but for the specific purpose of gaining a comparative advantage in this proceeding. Thus, whether Adwave's conduct is considered a misrepresentation or a lack of candor, the result is the same. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127 (1983). Gardner has simply evidenced a willingness to deceive the Commission by his false divestiture commitment. *Bellingham Television Associates, Ltd.*, 59 RR 2d 978 (1986). Indeed, Adwave's lack of candor before the Commission, especially in a hearing proceeding, is indicative of its future behavior. It is well-settled that in order to discharge its duties effectively, "the Commission must, of necessity, rely upon the statements and submissions of its licensees . . . . The fundamental importance of truthfulness and complete candor on the part of applicants, as well as licensees, in their dealings with the Commission is well established." *Lebanon Valley Radio, Inc.*, 35 FCC 2d 243, 258 (Rev. Bd. 1972), *review denied*, 39 FCC 2d 1099 (1973), *rev'd on other* grounds *sub nom. Lebanon Valley Radio, Inc. v. FCC*, 503 F.2d 196 (D.C. Cir. 1974). *See also* FCC v. WOKO, Inc., 329 U.S. 223, 227 (1946). Since the Commission must license thousands of radio and television stations in the public interest, it must therefore rely substantially on the completeness and accuracy of the submissions made to it. *WHW Enterprises, Inc. v. FCC, supra*, 753 F.2d at 1139; *RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982).

28. In its *Policy Regarding Character Qualifications in Broadcast Licensing (Character Policy Statement) (Gen. Docket 81-500); Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees* (BC Docket No. 78-108), 102 FCC 2d 1179 (1986), the Commission succinctly declared (102 FCC 2d at 1209-11):

> We believe it appropriate to give misrepesentation specific consideration in the context of this *Policy Statement*. The act of willful misrepresentation not only violates the Commission's Rules; it also raises immediate concerns over the licensee's ability to be truthful in any future dealings with the Commission.
>
> * * *
>
> As we have stated, the trait of 'truthfulness' is one of the two key elements of character necessary to operate a broadcast station in the public interest. The Commission is authorized to treat even the most insignificant misrepresentation as disqualifying.
>
> * * *
>
> We believe it necessary and appropriate to continue to view misrepresentation and lack of candor in an applicant's dealings with the Commission as serious breaches of trust. The integrity of the Commission's processes cannot be maintained without honest dealing with the Commission by licensees.

29. It is clear from the *Character Policy Statement* that honesty and forthrightness remain of paramount concern to the Commission. Here, Gardner sought to enhance his comparative position by putting forth a pledge to divest his ownership of Raystay, when in fact he had no such intention. His contemplated trust arrangement was a totally ineffective and disingenuous method of attempting to convince the Commission he would be divesting his ownership or his control. As an experienced businessman and broadcaster, Gardner cannot avoid the consequences of his wrongful conduct on the excuse that he did not know what divestiture meant. Thus, like the ALJ, we are unpersuaded by Adwave's defenses. First, while Gardner argues a lack of deceptive intent on his part, the facts nevertheless establish that he had a clear motive for deception when he submitted a divestiture pledge which he had no intention of fulfilling. Deceptive intent must be inferred from Gardner's deceptive conduct. Moreover, we adopt the ALJ's determination that it is impossible to accept Gardner's explanation that he thought he could satisfy his divestiture commitment by surrendering voting control to an appointed trustee of a trust. The arrangement which Gardner envisioned, as previously noted, would not have divested him of either ownership or control of Raystay. As discussed in greater detail at para. 46, *infra*, credibility findings of an ALJ will be given decisional deference, unless such determinations are in irreconcilable conflict with the record evidence. *WHW Enterprises v. FCC, supra*, 753 F. 2d at 1141. Finally, even under Adwave's reliance on *Attribution of Ownership Interests, supra*, Gardner could not have been considered a passive investor because he would have retained the positions of president, treasurer, and a director of Raystay. Thus, we concur with the ALJ's observation that how, *inter alia*, the chief executive officer of a company owning cable interests can be considered a "passive investor" is simply not (nor can it be) explained by Adwave.

30. In sum, we agree with the ALJ that Adwave must be disqualified with respect to the lack of candor/misrepresentation issue specified against it. The preponderance of the record evidence, as a whole, establishes that Adwave does not possess the qualifications to be a Commission licensee. *Steadman v. Securities and Exchange Commission*, 450 U.S. 91 (1981).

LAUDERSEA

31. Rosemarie A. Reardon is the principal of Laudersea. In 1978, she receive her doctoral degree from the University of South Dakota after an internship at Royal C. Johnson Veteran's Administration Medical Center in Sioux Falls, where she conducted individual psychotherapy, marital counseling and vocational testing, and worked with psychiatric, chemically dependent, and medical patients. Since 1978, Dr. Reardon has been in private practice as a counseling psychologist.

32. Dr. Reardon's husband, B. Scott Reardon, III, owns 100% of Sedgwick Broadcasting Company (SBC), the permittee of a new FM broadcast station for Haysville, Kansas. At the time of the hearing, the proposed station was not yet on the air (Laudersea Ex. 3). According to Dr. Reardon, she has no interest in SBC or the proposed Haysville station and does not intend to have such an interest in the future (*Id.*). Furthermore, according to Dr. Reardon, Mr. Reardon will have no ownership interest in the proposed Fort Lauderdale station, nor will he be an employee of Laudersea. Mr. Reardon proposed to be integrated into the management of the Haysville station, for which he applied in 1982; before he made that proposal, Dr. Reardon told him that she would move to Haysville if his application were granted. Thereafter, Dr. Reardon filed her Fort Lauderdale application. At the time she filed the application (or prior thereto), Dr. and Mr. Reardon had discussed the fact that she would move to Fort Lauderdale if her application were granted, whether that move was from Sioux Falls or Haysville, Kansas (Tr. 301). Dr. Reardon was prepared to leave her Sioux Falls practice, which she characterized as successful, in order to go to Haysville and do something "different" (Tr. 347-349).

33. Dr. Reardon has never worked at a radio station and has no prior broadcasting experience of any kind (Tr. 297). Before applying for WAXY, Dr. Reardon took no steps to learn about WAXY's facilities, dial position or format, and she does not even know what frequency the station will broadcast on. Since she filed her application, she has done nothing more to become informed about broadcasting other than "reading some articles in her husband's broadcasting journals at home" and consulting with her attorney. She got "some idea" of WAXY's audience from a periodical, but "that's about it." (Tr. 293). She believes that the Fort Lauderdale station is "lucrative," and this is a reason she filed her application (Tr. 295-296). Dr. Reardon owns no residence in Fort Lauderdale. She does not belong to any Fort Lauderdale organizations (Tr. 317). She has never been to Fort Lauderdale, and did not consider going there before she applied and she does not know the population of Fort Lauderdale or in which county it is located. Since she filed her application in May 1983, Dr. Reardon has done nothing more to learn about the Fort Lauderdale area other than talking to people who have vacationed there and completing her EEO statement by making a telephone call to the Chamber of Commerce shortly before that statement was filed in January 1985 (Tr. 354-355). She has not subscribed to any local newspaper or had any other contact with the Chamber of Commerce (Tr. 358).

34. Dr. Reardon apparently learned of the opportunity to apply for WAXY through Thomas L. Seibert, Mr. Reardon's communications attorney and a friend. At a Georgetown University reunion in the summer of 1980 attended by Mr. and Dr. Reardon and Siebert, they discussed radio as a business opportunity. Late in 1981 and early in 1982, during social gatherings, Siebert and the Reardons discussed the subject of the availability of the RKO stations for the first time (Tr. 580-581, 593-594, 597, 663, 737-740, 756, 758-759; Laudersea Ex. 7 at 1). Dr. Reardon could not remember telling Siebert at that time that she wanted to apply for WAXY. Neither could Siebert recall any discussion of the Fort Lauderdale station with Dr. Reardon during 1980 or 1981. However, according to Reardon, Siebert described a broadcast license in a Sunbelt area as a "premium business opportunity."

35. Siebert claimed that he had an "academic awareness" (Tr. 720) of the costs of constructing and operating a new station, and he believes that it is "more likely than not" that he discussed radio financing and the Commission's financial standards "generally" with Dr. Reardon, but could not specifically recall mentioning any cost figures or even having any specific discussion of financing and costs with Dr. Reardon (Tr. 740-747). Siebert believes he discussed licensing criteria, cost parameters, and the value of a permit with Dr. Reardon because this is what he would normally discuss with prospective clients. Siebert testified that "I do have a specific recollection of having a generalized discussion" about costs (Tr. 723), and when asked about discussing Commission financial requirements with Dr. Reardon, Siebert stated (Tr. 722):

> It is more likely than not, that in discussing that kind of opportunity, that I would have told her that a financial showing of so many hundreds of thousands of dollars has to be qualified to obtain a permit.

Siebert further testified (Tr. 729-730):

> [Counsel]: Was it your practice at that time to advise applicants that she should have a bank loan to support their financial qualifications?
>
> * * *
>
> [Siebert]: It would have been my standard practice to advise a client that the client must make the financial showing through some kind of recognized lending institution like a bank, an insurance company, or provide a personal financial statement.

However, Siebert qualified his answer by noting that Dr. Reardon was not actually a "client" (Tr. 730).

36. In 1982, David S. Birkeland, President of First Bank of South Dakota, met with Mr. and Dr. Readon at a restaurant (Tr. 561; Adwave Ex. 4 at 1-2). The ALJ found

that Mr. Reardon, a customer of Birkeland, requested this meeting. However, Laudersea (in its Exceptions, pg. 8) claims that Dr. Reardon was the person who had requested the meeting, and Dr. Reardon's testimony initially supported that claim (Tr. 561). Later, however, Dr. Reardon changed her testimony and stated that her husband had arranged the Birkeland meeting (Tr. 598). In any event, the purpose of the Reardons' meeting with Birkeland was a "general conversation about radio communications business." (Adwave Ex. 4 at 2-3). Dr. Reardon was aware that Birkeland had some experience with radio financing. However, Birkeland only offered general information" about some financing that he had previously done. Any discussion of the financial aspects of radio was of "very general nature" (Tr. 397), and nothing was said about any specific radio stations. Indeed, Dr. Reardon testified upon cross-examination as follows (Tr 564-565; emphases added):

> [Adwave Counsel]: Did you talk with Mr. Birkeland about banks in general loaning money in connection with applying for the WAXY facilities?
>
> [Reardon]: I don't recall at that meeting if I mentioned Fort Lauderdale.
>
> [Counsel]: Did you discuss with Mr. Birkeland any particular sum of money that you thought you'd need to borrow from a bank for any kind of project you might be involved in?
>
> [Reardon]: In 1982?
>
> [Counsel]: Yes.
>
> [Reardon]: During the meeting Mr. Birkeland brought up, he discussed -- and I don't remember the figures -- costs involved in banks, costs involved in startup stations, because obviously that was the interest between he and my husband. The subject of buying already existing stations costing millions of dollars, he already naturally mentioned in the course of the conversation. I don't know if that answers your question.
>
> [Counsel]: No. *I want to ask you whether you talked with Mr. Birkeland about how much money you thought you might need to borrow.*
>
> [Reardon]: *No. Oh, no, I did not.*
>
> [Counsel]: So it's clear, then -- I want to make the record clear. *You didn't discuss any specific sum of money with Mr. Birkeland in connection with your borrowing any money.*
>
> [Reardon]: *In connection with me personally borrowing money for any business venture, no.*
>
> [Counsel]: *And as I understand it, you didn't ask Mr. Birkeland for any commitment to loan you funds at that time; is that correct?*
>
> [Reardon]: In 1982? *No, I did not.*

37. Birkeland confirmed that he never told Reardon at this meeting that his bank was willing to loan her any money for the Fort Lauderdale station; at most, he asked the Reardons to keep "in touch" should they get involved in "any business opportunity" (Tr. 588). In fact, Birkeland has never loaned money to any applicant for a new radio station. He had been only involved with loans for four existing radio stations between 1970 and 1978 (Tr. 392-392). Further, Birkeland testified that he never intended to give Dr. Reardon a financing commitment of any kind, even if she filed an application. Notwithstanding all of the foregoing, Dr. Reardon, in opposing a petition to enlarge issues in July 1985, represented to the Commission that she relied on her discussion with Birkeland to establish *"a firm commitment from a committed source"* for the funds to construct and operate her proposed facility (Adwave Ex. 7).

38. Washington communications counsel, Leonard Joyce, was initially retained to represent Dr. Reardon "a matter of days" before the filing of her application (Tr. 746); however, he claims that he did not assist her in preparing her application (Tr. 750, 770). Reardon claims that she received an application form from Joyce in April or May 1983, but could not recall if the application form (FCC Form 301) contained instructions (Tr. 581). Joyce could not, however, be sure that he had, in fact, sent such a form (Tr. 750). Although Reardon read the part of the application which stated "carefully read instructions before filling out form" she did not bother to obtain the instructions before she completed the application. She claims she did not consult with anyone before answering the questions in the financial qualifications section, and then sent the completed application to Joyce, who returned a typed copy for her signature (I.D., paras. 92-93). Joyce, on the other hand, could not recall whether he had sent a completed form to her (Tr. 750). Reardon signed the application on May 11, 1983 (Adwave Ex. 8 at 12), but avers that she never discussed her answers to the financial qualifications questions with Joyce before the application was filed. Nor, says Reardon, did she inform Joyce of the basis for her financial certification (I.D., para. 93).

39. Joyce claims that he never asked the Reardons where she would get her financing, nor did he discuss cost estimates for the proposed station; and, Joyce did not directly discuss financial qualifications, as the term is used in the Commission's application, before Reardon's application was filed. Joyce testified, however, that he believed the Reardons were "pretty wealthy people" (Tr. 753-755; emphases added):

> [Counsel]: At anytime before that application was filed, did you discuss with Dr. Reardon her answers to the financial certifications questions on the application?
>
> [Joyce]: No.
>
> [Counsel]: At any time before the application was filed, this is May 12, 1983, did you have any discussions with Dr. Reardon concerning the Federal Communications Commissions financial qualifications requirements?

[Joyce]: As the question is phrased, my answer would be no.

[Counsel]: Do you have any discussions with Dr. Reardon concerning financing for the proposed facility?

* * *

[Joyce]: I had discussions with Mrs. Reardon and her husband concerning the fact that the winner of the RKO, if RKO were to lose, would be a multimillionaire and that the winner would have a very valuable property.

[Counsel]: When did that discussion take place?

[Joyce]: Well, as I said that would be -- I think I made that statement -- Well, I made it several times. I made it -- I think, the first time Scott Reardon called, I made that statement.

[Counsel]: And that would have been in April of § 1983?

[Joyce]: Yes.

[Counsel]: 1983?

[Joyce]: Yes. And then I'm sure that it was mentioned also when they were both on the phone.

[Counsel]: And that would have been several days before the application was filed?

[Joyce]: Yes.

[Counsel]: Was that the only comment or discussion that you had on the financing? Was there any comments or discussions about the financing for the proposed application?

[Joyce]: If your question is, was there discussion on the questions the Commission asked on the form, the answer would be no.

[Counsel]: Well, I guess my question is, did you ever ask them where they're going to get the money to build the station?

[Joyce]: Not in those words?

[Counsel]: Well, not in my specific words. Did you ever ask a question, maybe not in those words, but one that implied the same thing, that you were questioning where they were going to get their financing to build the station?

[Joyce]: I don't specifically remember me interrogating them. *There's one phrase I remember that Scott Reardon made. I'm almost sure it was Scott as opposed to Rosemarie and he said money is no problem. In my discussions with them I got the impression that they were pretty wealthy people.*

40. The record reveals that Reardon did not have sufficient net liquid assets of her own to build the station and was not relying on her own resources. However, when Reardon affirmatively certified that "sufficient net liquid assets are on hand or are available from committed sources" (FCC Form 301, Section III, Question 1), Reardon interpreted the term "net liquid assets" as "[m]oney that I would have sitting in an account that would be easily accessible" and finally defined "[s]ufficient net liquid assets" as her "own money" or "money I would be borrowing from a bank" (I.D., para. 98).

41. Reardon further claimed that she interpreted the requirement that liquid assets be "on hand" from "committed sources" would be satisfied by her "conversation with a banker, an individual who knows about loans and understood about radio." A "committed source" to her was merely "someone in the business of lending money" to "radio stations specifically" or to broadcasting "in general." She says she understood from her conversation with Birkeland that "if you have a station that's valuable, in a good market, and enjoying a profit, that of course a bank is going to be willing to look at working with you pending review of your own credentials and your own standing." Reardon further claims that when she certified that a lender had a "present firm intention" to provide her with funds, she meant that she "had actually gone to a lending source and asked if indeed this source or these people, people in banks, are willing to work with a radio station that is profitable and in a good market." She stated that it was "perfectly obvious" that if she had a license for a profitable station in a good market, then "a bank would of course look at it." It "never occurred" to Reardon to explain the basis of her certification. According to Reardon, she did not believe a negative answer would jeopardize her application, and that Joyce did not advise her how to answer the questions (I.D., paras. 99-100).

42. Reardon also claimed that she did not understand, and was not told by her then-attorney, Joyce, that an actual letter of intent from a financial institution was required until the summer of 1985, when the financial issue was sought against Laudersea (Laudersea Ex. 7 at 1-2). She says she only heard of a bank letter for the first time after her deposition was taken in May 1985. According to Reardon, Joyce told her (at the time her deposition was taken in the summer of 1985) that her conversation with Birkeland was "sufficient" and that a lending institution would work with her based upon the value of the property. However, Joyce, in preparation for Reardon's deposition, says he had a discussion with Reardon over the lack of any financial documents. Joyce first became aware that Reardon lacked any financial documentation when preparing for production of documents. Joyce remembers that Reardon discussed an oral commitment from a bank with him before her deposition was taken (Tr. 822). She told him at that time that she had talked to a banker, Birkeland, and she told Joyce that Birkeland "would provide the money." Joyce "got the impression" that she considered her oral commitment sufficient to

certify that she was financially qualified. He claims that he did not advise Reardon to secure any other form of financing, nor did he tell her that she needed a bank letter before the deposition. However, Joyce did tell Dr. Reardon that later on it might be necessary to get a written commitment in order to "nail it down" in resisting the challenge to Laudersea's financial qualifications. In a June 13, 1985, letter to Reardon, after Adwave petitioned to add a financial issue against Laudersea, Joyce told her that he would like Dr. Reardon to obtain a loan commitment letter. In a conversation after this letter was written, *Reardon told Joyce that she had an oral commitment from Birkeland;* however, she never told Joyce *that she did not, in fact,* have such a commitment (I.D., paras. 102-104).[4]

43. *Discussion:* Laudersea candidly admits and concedes in its Exceptions (at pp. 8-11; emphasis added), as it must, that *"under the Commission's prevailing standard Laudersea was not financially qualified* " at the time it filed its application in 1983. In its defense, Laudersea simply argues that it cannot be disqualified because of a lack of intent to deceive by Reardon, and "given Reardon's inexperience and naivete and the less than adequate legal assistance she received, disqualification of Laudersea would constitute an excessively harsh penalty . . . ." (Laudersea Exceptions, pg. 5)

44. However, we agree with the ALJ that notwithstanding these arguments, the fact remains that Dr. Reardon falsely certified that she had sufficient net liquid assets on hand or available from committed sources to construct and operate the requested facilities for three months at the time she filed her application. As the ALJ observed, the questions in FCC Form 301 relating to financial qualifications "were plain English words," and, given their reasonable meaning, there is no way Reardon could have certified "yes." Further, the ALJ opined (I.D., at n. 14):

> Dr. Reardon's argument that she did not know that a "no" answer [on FCC Form 301] would jeopardize her application is unworthy of belief. What did Dr. Reardon think – that the financial questions included in the application were irrelevant and of no significance?

Indeed, Reardon did not even know what it would cost to build and operate the station; she had no money of her own to build and operate; and she had made no arrangements to borrow the necessary funds to build and operate the station. Under these circumstances, Reardon's certification must be viewed as a deliberate false statement, and her plea for exoneration on the basis of her "interpretation" of the financial qualifications questions and ignorance is rejected. Also, it is significant to note that Reardon conceded that she indeed had no commitment from Birkeland or his bank for funds necessary to construct and operate. Nevertheless, she falsely represented in a statement filed in opposition to an enlargement request that she interpreted her conversation with Birkeland "as a firm commitment from a committed source . . . ." Reardon also represented to Joyce (her lawyer at the time) that she had an oral commitment from Birkeland and that his bank would provide the funds. Reardon knew, or should have known, that these statements were false because Birkeland, in fact, had absolutely not committed his bank to provide any funds to her. Thus, we agree with the ALJ's observation that (I.D., nn. 16,17):

> How any intelligent person, particularly one with advanced degrees, could have viewed the brief, general converation with Mr. Birkeland as constituting a "firm commitment from a committed source . . . ." is beyond comprehension.
>
> * * *
>
> Indeed, when Dr.Reardon later requested a bank loan letter from Mr. Birkeland, he refused to issue one.

Thus, the ALJ's conclusion is appropriate (I.D., para. 128) that:

> The proclivity of Dr. Reardon to fabricate facts to suit her own convenience and objectives further supports the conclusion that her self-styled "unique" interpretation of the financial questions is nothing but a transparent, disingenuous *post hoc* rationalization of her failure to do anything before certifying that she was financially qualified.

45. The Commission recently reaffirmed and advised the Court in its brief for Appellee in *Christian Children's Network v. FCC*, Case No. 88-1012, U.S. App. D.C., at p. 19: "Under Commission policy well established . . . it was not enough for an appellant simply to believe that it would be financially qualified by the time it obtained a constuction permit [*citing Dutchess Communication Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985)]. The Commission required that an applicant demonstrate a reasonable assurance of the availability of sufficient capital to build and initially operate the station." As the Board explained in *Washoe Shoshone Broadcasting*, 3 FCC Rcd at 3959 (Rev. Bd. 1988):

> The Commission's current application form (FCC Form 301) requires every applicant to certify, *under penalty of perjury*, that, "sufficient net liquid assets are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenue." FCC Form 301, Section III. Each applicant must swear that (a) "it has a reasonable assurance of a present firm intention for each agreement to furnish capital or purchase capital stock by parties to the application, each loan by banks, financial institutions or others, and each purchase of equipment on credit"; (b) "it can and will meet all contractural requirements as to collateral, guarantees, and capital investment"; and that (c) "it has determined that a reasonable assurance exists that all sources (excluding banks, financial institutions, and equipment manufacturers) have sufficient net liquid assets to meet these commitments."

And, as we stated in *Religious Broadcasting Network*, 3 FCC Rcd 4085, 4093 (Rev. Bd. 1988), *remanded* 3 FCC Rcd 6216 (Rev. Bd. 1988), an applicant:

> may not for certification purposes rely simply upon the undocumented assurances of [another] that all of the necessary finances will be forthcoming, without acquiring firsthand knowledge of the sufficiency of the assets upon which their personal certification is based . . . . To permit such principals to certify to their financial resources on nothing but the undocumented assurances of other [individuals] would be to negate entirely the efficacy of the sworn certification itself.

See also Concurring Statement, Northampton Media Associates, 3 FCC Rcd 5164, 5175 (Rev. Bd. 1988) which reemphasized:

> the importance of the rule of law set forth, once again, in *Religious Broadcasting Network:* a financial certification based upon no more than the undocumented assurances of a party . . . will be considered a false certification, for which summary disqualification will follow. As indicated at the outset, to the extent that the Commission continues to rely on certification in lieu of demonstrative evidence of financial ability, an applicant's certification must be based upon actual documentation; not upon a good faith "belief"; nor upon speculation or personal observation . . . .

Port Huron Family Radio, Inc., 4 FCC Rcd 2532, 2539-2540 (Rev. Bd. 1989).

46. Additionally, we will not disturb the ALJ's credibility determinations with respect to Dr. Reardon. Commission precedent requires that credibility findings of an ALJ be given decisional deference, unless those findings are in irreconcilable conflict with the record evidence. *Opal Chadwell*, 2 FCC Rcd 5502, 5504 (Rev. Bd. 1987), *remanded on other grounds*, FCC 89-7, released January 31, 1989; *see also TeleSTAR, Inc., supra* 2 FCC Rcd at 17; *Broadcast Associates of Colorado*, 104 FCC 2d 1619 (1986)(*modifying* 100 FCC 2d 616 (Rev. Bd. 1985))("absent extrinsic evidence to the contrary, we believe that [an] ALJ's judgment . . . is entitled to great weight"); *Signal Ministries, Inc.*, 104 FCC 2d 1481, 1486 (Rev. Bd. 1986)("in the absence of patent conflicts with the record evidence, the Commission accords special deference to [an ALJ's] credibility findings since the trier of fact has a superior opportunity to observe and evaluate a witness's demeanor and to judge his/her credibility"). Thus, some real and legally recognizable deference is to be accorded credibility findings of an ALJ unless "reversal is supported by substantial record evidence." *WHW Enterprises v. FCC, supra* 753 F.2d at 1141; *Port Huron Family Radio, Inc., supra*, FCC 4 Rcd at 2535.

47. Finally, with respect to Laudersea's argument that it should not be responsible for the actions (or, more particularly, the inaction) of its original counsel, we note that it is well established by the Commission that:

> Counsel is the applicant's agent . . . and the applicant is bound by counsel's actions . . . . We believe it is appropriate, therefore, to expect that applicants will choose their counsel with care and know that they will suffer the consequences if they are represented by counsel who do not vigorously prosecute their applications."

Hillebrand Broadcasting, Inc., 1 FCC Rcd 419, 420 at n. 6 (1986).

48. In sum, after Reardon was "advised" of the opportunity to file for a valuable RKO FM facility by experienced communications counsel (Siebert, who was counsel for Reardon's husband, a successful permittee for another facility), retained other experienced communications counsel to prepare and file her application. Thus, we generally agree with the ALJ's observation that (I.D., at n. 15):

> Dr. Reardon's claim of ignorance must be rejected. First, Dr. Reardon could have asked counsel to explain the Commission's financial qualification standards; she could have asked her husband, who had himself only recently filed a broadcast application, about the financial questions on the application. She did neither. Nor did Dr. Reardon even bother to read the instructions to the application form. Her cavalier approach must be condemned. To do otherwise would place a premium on an applicant's recklessness and disregard for truth and accuracy, thereby completely undermining the Commission's financial certification procedure.

Indeed, the record herein demonstrates that Reardon is *precisely* the type of applicant the Commission has denounced in its *Report and Order In the Matter of Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, FCC 89-110, released April 20, 1989. As the Commission stated in this *Report and Order* (at paras. 15-16; emphasis added):

> Our goal in modifying Form 301 was to streamline and expedite the application process by removing out-of-date, burdensome, or superfluous reporting requirements. In so doing, we hoped to aid the applicant in preparing its application and facilitate the processing of the application by the Commission staff. We believe that our original goal was and is still sound policy. However, based upon our experience in the intervening eight years, and a careful review of the record in this proceeding and in BC Docket No. 81-742, we now recognize that these reforms have had unintended results that are not necessarily in the public interest.
>
> As discussed in detail below, *we now believe that streamlining the application process may have facilitated the filing of applications by financially unqualified, sham and/or abusive applicants and made it more difficult to detect such applicants once they are in a comparative proceeding. By financially unqualified applicants we mean those who do not have sufficient net liquid assets on hand or committed sources of funds to construct and operate the proposed facility for three months.*

49. Finally, we note that the ALJ, although determining that Laudersea was ultimately unqualified, did conclude that "Laudersea may now be found financially qualified" because "the bank loan presently available to the applicant is sufficient . . . " (I.D., paras. 118-119). Both Adwave and the Mass Media Bureau argue that the ALJ should not have accepted Laudersea's amendment pertaining to its "bank loan." We agree. Here, Laudersea admits that it was not financially qualified at the time it certified and filed its application. We have determined that Reardon falsely certified Laudersea's application, and must be disqualified. Thus, it was error for the ALJ to have accepted Laudersea's financial amendment. *See Pepper Schultz*, 2 FCC Rcd 1476 (1987); *George Edward Gunter*, 104 FCC 2d 1363, 1366 (Rev. Bd. 1986); *Port Huron Family Radio, Inc., supra*, at n. 6. Thus, both qualifying issues *(see* para. 3, *supra)* must be resolved against Laudersea.

COZZIN

50. Cozzin Communication Corporation is a Delaware corporation owned by William H. (Bill) Cosby, Jr. (51%) and Joseph T. Zingale (49%). Zingale is president, secretary and director. There are no other officers or directors (Cozzin Ex. 1). Administrative Law Judge Walter C. Miller *(Boston ALJ)* found, in his *Contingent Initial Decision*, FCC 86D-47, released July 23, 1986 *(Boston I.D.)*, that Zingale has been in broadcasting for over thirty years. For 21 of those years, he had ownership interests in nine different broadcast stations, mostly in major markets; and, as Zingale testified: "I had been involved in ownership and, of course, had dealt with the FCC and FCC filings . . . ." (Tr. 3786). Zingale is married to Mary Jo Zingale, and they have three adult children: Tom, Nancy, and Rozanne Zingale *(Boston I.D.*, paras. 11-12).

51. On January 10, 1985, RKO filed a motion seeking to have the issues enlarged in the Boston proceeding against Cozzin. It alleged that in March 1984, "47" applications for new Low Power Television (LPTV) facilities were filed with the Commission, purportedly by family members of Cozzin principal, Joseph Zingale. Some were ostensibly signed by Zingale's wife, Mary Jo. The others were ostensibly signed by his three children (Tom, Nancy and Rozanne). However, RKO claimed that these applications had actually been signed and executed by Joseph Zingale, but that he attempted to make it appear as if his wife and children, in fact, had signed them. In addition, since Joseph Zingale had controlled the preparation and execution of these LTPV applications, a real party-in-interest issue was raised by RKO. Both requested issues were added by *Order*, FCC 85M-890, released March 1, 1985. (As will be demonstrated, *infra*, there were in fact, 46 LPTV applications at issue.)

52. By *Order*, FCC 85M-1076, released March 15, 1985, the ALJ in the instant Ft. Lauderdale proceeding enlarged issues against Cozzin (*see* para. 6, *supra)*, and noted that the resolution of these issues in the Boston proceeding would be binding on the parties to the instant proceeding (I.D., para. 67). The *Boston I. D.* disqualified Cozzin pursuant to these issues, and the ALJ here incorported the findings and conclusions relating to such disqualification by reference, and similarly disqualified Cozzin (I.D., para. 130).

53. The *Boston ALJ* found that Cozzin filed 13 Low Power Television Applications with the Commission in 1981 (FCC Form 346). In February 1983, Cozzin filed nine additional applications. The nine 1983 applications were prepared by Jeffrey Nightbyrd and his firm, ATD Engineering (which also does business as Low Power Technology, Inc.)(Tr. 3756-3757). Nightbyrd apparently billed Cozzin $22,500 ($2,500 per application) for the nine 1983 LPTV applications ATD prepared on behalf of Cozzin. As of February 1984, and even though Nightbyrd had rebilled Cozzin eight times, Nightbyrd claimed that Cozzin still owed ATD $11,075. Throughout 1983 and 1984, Nightbyrd continued to press Joseph Zingale for the money owed, since it was Zingale who had made all the arrangements with ATD, had negotiated the price of the services, and who signed the applications ATD had prepared.

54. In May 1983, Nightbyrd was in Cleveland on other business, but was invited to visit with the Zingale family apparently principally to celebrate Joseph Zingale's birthday (Tr. 3764). During his visit, there was some general and limited discussion of LPTV.[5] Some nine months later, on February 6, 1984, at Joseph Zingale's request and Cozzin's expense (Tr. 3773), Nightbyrd and an ATD engineer, Jeremy Lansman, travelled to Gainesville, Florida. Cozzin had received an LPTV construction permit for Alachua, Florida (a community near Gainesville), and Joseph Zingale wanted the two men to look over Cozzin's proposed antenna site to determine what kind of coverage Cozzin would obtain, and to kindle some interest in the station in the Gainesville market. At their father's request, two of Joseph Zingale's children (Tom and Nancy) were also in Gainesville. On the last day Nightbyrd was in Gainesville, his office forwarded to him a new Commission cut-off list for LPTV applications. The cut-off list was dated February 7, 1984, and bore a filing deadline date of March 8, 1984. Joseph, Tom, and Nancy allegedly looked through the list. Joseph Zingale said to Nightbyrd "you've got to file a few of these for us;" however, Nightbyrd was reluctant to do so (because of the money Cozzin still owed) and when Nightbyrd departed Gainesville he had not agreed to do any further LPTV work for Joseph Zingale (*Boston I.D.*, paras. 17-18).

55. However, within a week after the February 1984 meeting, Joseph Zingale telephoned Nightbyrd and insisted that Nightbyrd file some LPTV applications. Nightbyrd would not agree, but Zingale persisted, and continued to call. Finally, Nightbyrd gave in. He concluded that, if he filed some applications for Joseph Zingale, he might be able to collect his unpaid bill. Thus it was agreed that Joseph Zingale was to get the non-engineering portions of each application filled in, and then return them to Nightbyrd in Colorado. Nightbyrd was to complete engineering portions of FCC Forms 346 and timely file the applications in Washington with the Commission (*Boston I.D.*, paras. 19-20).

56. On March 2, 1984. Joseph Zingale forwarded applications to ATD (Low Power Technology) for Nightbyrd to complete the engineering portions and file. He accompanied them with a cover letter on Cozzin letterhead, sent from Cozzin's business office in Cleveland, Ohio, addressed to Jeremy Lansman, and signed by "Joseph T. Zingale, President." The letter reads as follows (RKO Ex. 29; emphases added):

Mr. Jeremy Lansman
ATD Engineering,Inc.
1245 Pearl Street. Suite 200
Boulder, Colorado 80302

Dear Jeremy:

Enclosed please find signed, FCC forms by Mary Jo, Tom, Nancy, and Rozanne Zingale. *There are twelve signed copies by each of them.*

I have circled twenty-four stations that I would like to apply for on the individual pages from the cut off list. Please use two different names on each of the twenty four application s.

I've also enclosed a check to cover travel expenses for Jeff and yourself to Gainesville. Thanks in advance.

Sincerely,
Joseph T. Zingale
President

57. When Nightbyrd read this letter, he assumed that the accompanying applications had indeed been signed by Mary Jo, Tom, Nancy, and Rozanne (RKO Ex. 72). Thereafter, on March 13, 1984, Nightbyrd wrote Joseph Zingale. He enclosed a list for Zingale that indicated Low Power Technology had filed 46 applications, many of which were filed for individual Zingale family members and which were mutually exclusive with each other. The covering letter from Nightbyrd reads as follows (RKO Ex. 30):

Mr. Joseph Zingale
2945 Chagrin Blvd. No. 207
Cleveland, Ohio 44122

Here are all the channels we filed for all your various kith and kin. Good luck, Mr. High Power.

Sincerely,
Jeffrey Nightbyrd

58. The list attached indicated that 46 LPTV applications had been filed with the Commission on behalf of various Zingle family members, as follows (RKO Ex. 30):

Gainesville, FL; Channel 29
Mary Jo Zingale
Nancy Zingale
Rozanne Zingale
Tom Zingale

Gainesville, FL; Channel 26
Mary Jo Zingale
Nancy Zingale
Rozanne Zingale
Tom Zingale

Cincinnati, OH; Channel 39
Mary Jo Zingale
Nancy Zingale
Rozanne Zingale
Tom Zingale

Cleveland, OH; Channel 35
Mary Jo Zingale
Nancy Zingale
Rozanne Zingle
Tom Zingale

Gainesville, FL; Channel 42
Mary Jo Zingale
Nancy Zingale
Rozanne Zingale

Gainesville, FL; Channel 39
Mary Jo Zingale
Nancy Zingale
Rozanne Zingale
Tom Zingale

San Francisco, CA; Channel 67
Mary Jo Zingale
Nancy Zingale

Cleveland, OH; Channel 31
Mary J. Zingale
Rozanne Zingale
Tom Zingale

Cincinnati, OH; Channel 25
Mary Jo Zingale
Nancy Zingale
Rozanne Zingale
Tom Zingale

Fresno, CA; Channel 7
Mary Jo Zingale
Nancy Zingale

Cleveland, OH; Channel 12
Mary Jo Zingale
Nancy Zingale
Rozanne Zingale
Tom Zingale

Ames, IA; Channel 23
Mary Jo Zingale
Nancy Zingale

Ogden, UT; Channel 64
Rozanne Zingale
Tom Zingale

Tahoe City, CA; Channel 39
Rozanne Zingale
Tom Zingale

Dubuque, IA; Channel 62

Rozanne Zingale
Tom Zingale

59. RKO commissioned a certified document examiner (James T. Miller) to review numerous documents, including these LPTV applications, containing various Zingale family member signatures. His written testimony reveals the following (RKO Ex. 10, at pps. 2, 6-7, 9-10; emphases added):

> My testimony describes my findings with regard to the authenticity of the signatures of Mary Jo Zingale, Rozanne Zingale, Nancy Zingale,and Thomas Zingale on Changes in a Low Power Television, Television Translator, or FM Translator Station (LPTV Applications); on March 8, 1984 amendments to their LPTV applications; and on various other documents.
>
> * * *
>
> *After conducting a detailed professional examination, I found that many of the documents did not bear authentic signatures.*
>
> Each page of the eight fifteen-page LPTV applications . . . was prepared from photocopies of the same original document. Some pages of the Applications, such as pages five and six, are exact duplicates of the pages of the original document. Other pages, while photocopies, contain added typing, such as different typed names and bear different signatures. For example, the ninth pages were photocopied from a single source, but none of the entries on those pages was copied.
>
> *None of the signatures on the LPTV Application is genuine.* After comparing the known signatures of Mary Jo Zingale . . . (with the three signatures on each of her LPTV Applications) . . . I determined that Mary Jo Zingale did not sign any of the nine signatures in question. Similarly, I concluded that Nancy Zingale . . . did not sign any of the three questioned signatures on the LPTV Applications in her name . . . . Further, Rozanne Zingale . . . .did not sign any of the nine questioned signatures on the three LPTV Applications in her name . . . . Finally, Thomas Zingale . . . did not sign any of the three questioned signatures on the LPTV Application in his name.
>
> I found that it was Joseph T. Zingale . . . who wrote all nine of the "Mary Jo Zingale" signatures on the LPTV Applications I examined . . . It is highly probable that he also wrote the nine "Rozanne Zingale" signatures . . . and the three "Nancy Zingale" signatures . . . and the three "Tom Zingale" signatures . . . . on the LPTV Applications.
>
> * * *
>
> *Regarding whether Joseph T. Zingale wrote the signatures on the eight LPTV Applications. .. freely and naturally, it is my opinion that the nine "Mary Jo Zingle" and the three "Tom Zingale" signatures are written in an illegible style similar to that of Joseph T. Zingale. Although those signatures are somewhat smaller than his writing, Joseph Zingale made no apparent attempt to disguise them.*
>
> It is also my opinion that Joseph T. Zingale wrote the nine "Rozanne Zingale" . . . and the three "Nancy Zingale" . . . signatures in a *different style* from the "Mary Jo" . . . and "Tom" . . . signatures and in a different style from his own signature. The "Rozanne" and "Nancy" signatures are smaller, and all the letters are clear and legible. Further, the last name "Zingale" in these twelve signatures is so strikingly different from the others that to an untrained person they might well appear to have been signed by a different writer. In writing the nine "Rozanne" and the three "Nancy" signatures on the questioned documents, *Joseph Zingale made a conscious effort to make them appear different from his own writing style. It appears that he made no effort to copy the handwriting style of the four alleged signers, however.*
>
> My examination also leads me to an opinion concerning the ink used in the signatures on the LPTV Applications . . . . Although I am prevented from examining the ink, it would appear that one pen was used for the "Mary Jo" and "Tom" signatures, that another pen with a slightly heavier line was used for the "Rozanne" signatures, and that a third pen with much heavier line was used for the "Nancy" signatures.

60. Zingale testified that he took the responsibility to "coordinate" the multiple filings (Tr. 3785):

> [Counsel]: And is it fair to say that you then undertook the primary responsibility for putting the LPTV applications together?
>
> [Zingale]: Yes, I coordinated that effort. I was asked to coordinate that effort, yes, by the family members.
>
> [Counsel]: I thought it was your testimony that your role as coordinator just came about because it was a natural thing, that there was no specific request made to you.
>
> [Zingale]: I don't remember if there was a specific request. I think there was, but I don't remember specifically. But yes, it was a natural thing for me to do it, because I had at least had some experience in broadcasting, in dealing with these forms.

However, the Zingale family members (who may or may not have specifically requested Joseph Zingale to "coordinate" these filings) were all but unaware of other aspects and circumstances surrounding the filing of these 46

LPTV applications. The Boston ALJ determined that the Zingale children were not even sure how many LPTV applications they ostensibly filed. It was only *after* the LPTV applications had been filed on March 8, 1984, that Tom Zingale learned how many had been filed in his name and in which markets they had been filed (Tr. 4025-4027). Tom Zingale exhibited little knowledge of how many applications had actually been filed in his name (Tr. 4027):

> [Counsel]: But do you recall a conversation, a phone conversation in which [your father] did tell you which market he had applied for?
>
> [Tom Zingale]: I'm sure that's how I knew about it, is over the telephone.
>
> [Counsel]: How many were filed for you?
>
> [Zingale]: Eleven altogether.
>
> [Counsel]: And when did you learn that it was eleven?
>
> [Zingale]: Sometime around that same time period.
>
> [Counsel]: Do you recall testifying at your deposition that it was nine or ten?
>
> [Zingale]: I guess I said something along those lines, nine, ten, eleven . . . .

Nancy Zingale was never sent copies of the applications that were filed in her name. At the time the applications were filed, she had never seen an LPTV application, and had no idea what kind of information was needed to fill one out (Tr. 3930). At her deposition, she claimed she told Nightbyrd that she wanted to apply in twelve markets, but at the hearing she testified she personally hired Nightbyrd to prepare 11 LPTV applications (Tr. 3915, 3918). Nightbyrd, however, denies that Nancy Zingale ever personally hired him (RKO Ex. 72). At her deposition, Rozanne Zingale said that Nightbyrd was to prepare 10 or 12 applications for her, but at the hearing she swore that her father had hired Nightbyrd to prepare between 15 or 20 LPTV applications (Tr. 3956). Rozanne had never seen the LPTV cut-off list, nor had she written down the communities in which she allegedly wished to file applications (Tr. 3953). Finally, Mary Jo Zingale, Joseph Zingale's wife, did not learn in which markets applications had been filed in her name until after they had been filed *(Boston I.D.*, paras. 28-31).

61. Similarly, on the question of who was to pay for filing the applications, the *Boston ALJ* found that the Zingale children were wholly ignorant. Jeffrey Nightbyrd never discussed billing with Mary Jo Zingale or any of the Zingale children, and Nightbyrd simply billed Joseph Zingale of Cozzin Communications (RKO Ex. 72). Before he was deposed, Tom Zingale had not seen a bill for the preparation of the LPTV applications. Rozanne Zingale had never seen a bill, and prior to her deposition she had never even inquired about a bill (Tr. 3965). Before she was deposed, Nancy Zingale was not aware of any bill from Nightbyrd, nor had Mary Jo Zingale seen such a bill. Tom, Nancy and Rozanne Zingale were even unaware that a bill had been sent to Joseph Zingale. It was not until after she was deposed in June 1985, that Mary Jo Zingale paid Nightbyrd for preparing the 46 LPTV applications *(Boston I.D.*, paras. 32-33).

62. *Discussion:* In its exceptions, Cozzin claims the its disqualification by the *Boston ALJ* was a result of the following (Cozzin Exceptions, pg. ii):

> Judge Miller's findings and conclusions are systematically biased against Mr. Zingale. They are unsupported by record evidence and are diametrically in conflict with probative evidence Judge Miller rejected improperly or simply ignored. Many of Judge Miller's conclusions of fact are entirely conclusory and speculative. Evil motives ascribed to Mr. Zingale have no record support and appear to be figments of Judge Miller's imagination, frequently made up after the fact to support predetermined conclusions.

At oral argument, counsel for Cozzin conceded that Cozzin had not requested the recusal of the *Boston ALJ*, and that this language was, in essence, no more than hyperbole (Oral Argument,Tr. 399-400). We will not belabor the matter, but note in passing that "it goes without saying that the characteristically vigorous language of appellate advocates, particularly those wounded by a litigation loss, is entirely irrelevant to a dispassionate inquiry . . ." *Western Union International, Inc., v. FCC*, 804 F.2d 1280, 1288 at n.7 (D.C. Cir. 1986). More to the point, however, Cozzin argues (Cozzin Exceptions, para. 10):

> The I.D. ignores a wide ranging and most significant body of probative and internally consistent evidence which firmly supports the conclusion that the members of the Zingale family were, in fact, *bona fide* applicants and that Joseph Zingale was merely an overzealous agent acting on their behalf. The Presiding Officer does not even mention, let alone find evidence to contradict, direct testimony by all family members as to their state of mind at the time the LPTV applications were filed. This testimony, and that of adverse witness Jeffrey Nightbyrd, provides an overwhelmingly conflict free and unimpeached body of evidence supporting the conclusion that the family members, and not Mr. Zingale, are the real parties in interest to their applications. For [the *Boston ALJ*] to rule otherwise, he must conclude -- and he did not -- that all four applicants wholly lacked credibility -- that all lied to the Commission in furtherance of a conspiracy with their father to rig the lottery process and deceive the Commission.

63. Zingale admits that he did, in fact, affix the signatures of his wife and three children to 46 LPTV applications which were filed with the Commission. However, Zingale avers that he did so merely "to help them become established in broadcasting and LPTV seemed to offer a good opportunity" (Cozzin Exceptions, p. vii). Zingale further claims that he had "oral powers of attorney" from the family members, and "obtained their written consent" through four separate "powers of attorney." (*Id.*). With

respect to the "real-party-in-interest" issue, Zingale claims that he was not the "real-party-in-interest," and reiterates that "as a husband and father, though overzealous and overinvolved, [he] was helping his family members get a start in the broadcast industry." (*Id.*, at p. viii).

64. Zingale also claims in his defense "ignorance" of the Commission's rules that an applicant must actually and personally execute application forms. That rule, Section 73.3513, 47 C.F.R. §73.3513, provides in pertinent part (emphases added):

> *Signing of Applications* : (a) Applications, amendments thereto, and related statements of fact required by the FCC must be signed by the following persons:
>
> (1) *Individual Applicant*. The applicant, if the applicant is an individual.
>
> * * *
>
> (b) Applications, amendments thereto, and related statements of fact required by the FCC *may be signed by the applicant's attorney in case of the applicant's physical disability or of his absence from the United States*. The attorney shall in the event separately set forth the reason why the application is not signed by the applicant. In addition, if any matter is stated on the basis of the attorney's belief only (rather than his knowledge), he shall separately set forth his reasons for believing that such statements are true.
>
> * * *
>
> (d) Applications, amendments, and related statements of fact need not be submitted under oath. Willful false statements made therein however, will be considered a violation of §73.1015, are also punishable by fine and imprisonment, U.S. Code, Title 18, section 1001, and by appropriate administrative sanctions including revocation of station license pursuant to Section 312(a)(i) of the Communications Act.

However, Zingale also knew that the Commission was routinely rejecting incomplete applications (Tr. 3889):

> [Bureau Counsel]: And was it your state of mind at the time that the Commission had a very strict policy on accepting low power applications, and that they wanted applications absolutely perfect?
>
> [Zingale]: Yes, complete I think was their term for it, yes.
>
> [Bureau Counsel]: And was your understanding that any possible discrepancy or anything that would be unusual about an application could subject it to being thrown out or not accepted?
>
> [Zingale]: Well, I think again the FCC used the word complete, that their low power applications they wanted complete, and if they weren't complete, they were going to be thrown out.

65. In its Exceptions, Cozzin vehemently argues that (at para. 39; emphases added):

> the Presiding Officer rejects testimony that Joseph Zingale was no longer personally interested in filing LPTV applications. Mr.Zingale testified that COZZIN Communications had moved on to more substantial projects such as acquisition of the RKO stations, and *Mr. Zingale did not wish to jeopardize his own working relationship with Mr. Cosby, COZZIN's 51 % shareholder, by filing applications for himself* (Tr. 3777). The Presiding Officer dismisses Mr. Zingale's testimony out of hand, asserting that it is contrary to the weight of evidence adduced in this proceeding. In fact . . . there is no contrary evidence of record, and there is no basis for not fully crediting Mr. Zingale's testimony in this regard. *The best evidence is that no further applications were ever filed by Zingale or COZZIN.*

In this regard, Joseph Zingale testified (Tr. 3776-3778; emphases added):

> [Zingale]: And, of course, this time, somewhere around that time, we -- I believe I said, we had maybe bigger fish to fry, and that is we applied -- we talked to the people at RKO about possibly buying all of [the RKO] stations -- this was before there was a hearing -- on a distress sale basis, and we did in fact make a major effort at that with the corporation people at RKO and did go to the FCC with that possibility.
>
> [Counsel for RKO]: *Did you consider filing LPTV applications on your own behalf* ?
>
> [Zingale]: *On my own behalf* ?
>
> [Counsel]: *Yes.*
>
> [Zingale]: *No. I certainly wouldn't do that without my partner.*
>
> [Counsel]: Wasn't it the understanding between yourself and Mr. Cosby that any applications that were going to be made for LPTV stations or other broadcast licenses were going to have to be done through Cozzin?
>
> [Zingale]: There was no understanding of that, *but I certainly would never have done that on my own.* It was just not our working situation.
>
> [Counsel]: Why was LPTV not a good idea for Cozzin, but it remained a good idea for your children?

> [Zingale]: Well, I'm an experienced broadcaster. I've been in broadcasting for 32 years. I have owned major radio stations in major markets. Cosby, I think is also a major entertainer. And what made sense in 1960 – that is, have a string of stations, be it low power but nevertheless more than seven stations at that time, in major markets, all programming the same thing, music videos – made a lot of sense then.

67. Indeed, this argument may prove too much by half. Had Joseph Zingale prepared and filed LPTV applications in his own name, (1) he would have drastically limited the number of applications he could file (one per channel per community), and (2) he would have directly, by his own overt action, deprived Cozzin and his 51% shareholder (Cosby) of a business opportunity. However, even without drawing this inference, we hold that, at a minimum, the record evidence demonstrates that Joseph Zingale was the real- party-in-interest and attempted to be "stuffing the ballot box" to increase his chances of winning LPTV construction permits in numerous communities (by as much as 4 times); a practice which the Commission declared "would seriously jeopardize the integrity of the Commission's processes." *Second Report and Order* (*Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings),* 53 RR 2d 1401, 1417 (1983). [6]

68. Cozzin argues, of course, that Joseph Zingale was not the real-party-in-interest in his wife's and children's LPTV applications. The well-established test for determining if an individual is, in fact, the real-party-in-interest is founded upon ownership or who is, or will be, in a position to actually or potentially control the licensee. *KOWL, Inc.*, 49 FCC 2d 962 (Rev. Bd. 1974). Here, we concur with the *Boston ALJ* that the record in this proceeding overwhelmingly establishes that Joseph Zingale totally controlled the preparation of the LPTV applications at issue, and that his family members were no more than nominal fronts.

69. Cozzin argues that the unrebutted and "credible" testimony of Zingale's wife and children supports its position that Joseph Zingale was not the "real party-in-interest." Contrary to Cozzin's claims, however, the *Boston ALJ* did make credibility findings with respect to the testimony of the Zingales. (*See, e.g., Boston I. D.*, at paras. 15, 34 and nn. 10, 11, 14, 18, 22). Thus, we agree with the ALJ that the self-serving (and obviously biased) testimony of Joseph Zingale's wife and three children is, in many respects, inherently incredible. And, as noted above, Commission precedent requires that credibility findings of an ALJ must given decisional deference, unless those findings are in irreconcilable conflict with the record evidence. *Opal Chadwell*, 2 FCC Rcd 5502, 5504 (Rev. Bd. 1987)(and cases cited at para. 46, *supra).* Moreover, and more specifically, the direct and circumstantial evidence adduced at hearing is overwhelming that Zingale was the real-party- in-interest and intended to "stack" the LPTV lottery process in his favor. As we quoted in *Silver Star Communications - Albany*, Inc., 3 FCC Rcd 6342, 6351 (Rev. Bd. 1988), "some circumstantial evidence is very strong, as when you find a trout in the milk." [7] Thus, while it is undisputed that Joseph Zingale executed the 46 LPTV applications in various family members names (*prima facie* violating 47 CFR §73.3513), to believe that he did so pursuant to express "oral" (and, later) written "powers of attorney" would not simply not be rational or credible. [8] For example, the handwritten "powers of attorney" (RKO Exs. 11-14) are virtually identical and declare only that: "This will serve as a power of attorney for Joe Zingale to represent me before the FCC for current LPTV applications." Mary Jo Zingale's statement is dated February 28, 1984, and the three children's statements are dated February 27, 1984. None, however, is notarized or witnessed. While the existence of valid "powers of attorney" is not relevant to the real-party-in-interest issue, we observe that the testimony of Joseph Zingale that he was able to obtain from his files these documents, but could not produce other documents *(e.g.,* the March 2, 1984 letter to Nightbyrd) because he routinely destroyed or did not keep other documents, is similarly not capable of belief. In this regard, we note that Cozzin is a multiple licensee and applicant before the Commission, and even attempted to purchase all the RKO stations *(see* para. 65, *supra).* Why Zingale would "routinely destroy" other important business documents, yet retain these statements, is indeed puzzling.

70. While Cozzin claims that the family members' background, experience, "interest" in LPTV, and financial resources conclusively proves that Joseph Zingale was not the real-party-in-interest, and further describes portions of the conflicting testimony of the Zingales as "knit-picking" and based upon "immaterial, trivial and erroneous" facts (Cozzin Exceptions, pps. 21-22), we concur with the *Boston ALJ* that Zingale's wife and children indeed possessed little knowledge of the LPTV applications, the number of applications filed, their preparation, and payment for services rendered by Nightbyrd's organization.

71. With respect to the March 2, 1984 letter to Nightbyrd, we do not necessarily agree with the *Boston ALJ* that the testimony concerning paragraphs 1 and 2 of that letter *(see* para. 56, *supra)* conclusively demonstrates that Zingale was referring to the same 48 applications he sent to Nightbyrd. However, we believe that, at a minimum, this letter does demonstrate a further attempt by Joseph Zingale to deceive the Commission *("I* have circled twenty-four stations that *I* would like to apply for . . . . *Please use two different names on each of the twenty-four applications.")* More specifically, Zingale here plainly indicates twenty-four facilities he would like to apply for, yet he instructs Nightbyrd to insert "two different names on each" of the applications as the purported applicants (presumably names of his family members).

72. Concerning the testimony of the expert document examiner, James T. Miller (who Cozzin elected not to subject to cross-examination), Cozzin submits that the self-serving testimony of Joseph Zingale adequately rebuts the contentions that Zingale "consciously tried to make the signature of his wife and children appear different from his own writing style." While attacking the ALJ for allegedly relying "mainly" on "his own unqualified 'expertise'" to support the conclusion that Joseph Zingale had "committed an intentional misrepresentation" in the execution of the LPTV applications (Cozzin Exceptions, para. 62), it then attempts to draw the Board into making its own independent examination of the handwriting exemplars of Zingale. We note only that the handwriting exemplars submitted by Cozzin (Exceptions, para. 63) do appear to be materially different. However, as Cozzin's own counsel conceded at oral argument (Oral Argument, Tr. 411, emphasis added):

> [W]hat the record shows is that the first two, Mary Jo and Tom were done in precisely the handwriting style -- the signature style of Mr.Zingale. That the other two, Roseanne and Nancy, were done in the handwriting, not the signature style of Mr. Zingale; therefore, it is incorrect for the judge to conclude that he tried to make it different from his own writing style. He wrote them exactly in his own writing style, *but two different.*

The record evidence, and the testimony of James T. Miller, which Cozzin only attempts to rebut by the self-serving testimony of Joseph Zingale, is more than adequate to support the adverse conclusions reached by the ALJ.

73. Thus, we hold that the record evidence, taken as a whole, must lead to the ineluctable conclusion that Joseph Zingale (1) misrepresented facts to the Commission when he executed the signatures of his wife and children on 46 LPTV applications, (2) that he did so with intent to deceive the Commission, and "stack" the Commission's LPTV lottery process in his favor; and (3) he was the "real-party-in-interest" in the 46 LPTV applications filed in his family member's names. Such actions cannot be condoned, and Cozzin (whose sole officer, director, and 49% shareholder is Joseph Zingale) must be found to be disqualified. *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946) and citations at paras. 27-28, *supra.*

SOUTH JERSEY

74. South Jersey has been determined to be fully qualified to construct and operate as proposed. No qualifying issues were specified against South Jersey, and no party during the course of this proceeding sought to enlarge issues against South Jersey. While South Jersey, and its principals, are multiple licensees and propose no integration of ownership and management, it is the only qualified applicant remaining; thus, the comparative aspects of South Jersey's application (or the disqualified applicants) need not be addressed.

CONCLUSIONS

75. ACCORDINGLY, IT IS ORDERED, The unopposed Motion for Leave to Amend, filed November 16, 1987 by South Jersey Radio, Inc., IS GRANTED, and the proposed amendment IS ACCEPTED; and,

76. IT IS FURTHER ORDERED, That the applications of Adwave Company (File No. BPH-830510AL); Cozzin Communications Corporation (File No. BPH-830512AW); and Rosemarie A. Reardon d/b/a Laudersea Broadcasting Company (File No. BPH-830512CP) ARE DENIED; and,

77. IT IS FURTHER ORDERED, That the application of South Jersey Radio, Inc. (File No. BPH-830511AK) is RANKED FIRST in the captioned proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Because of the Commission's directive to review the issues with respect to the competing applicants in the remaining RKO proceedings "with highest priority," our consideration of pending exceptions in other proceedings may be held in abeyance for approximately ninety days.

[2] On August 19, 1985, RKO filed comments in support of South Jersey's Motion to Enlarge Issues Against Adwave. It there attached copies of pertinent portions of Gardner's deposition testimony which first revealed his considerations of "divestiture" (Deposition transcript, pp. 40-41):

> [RKO Counsel]: As I understand it, you have represented that if you are successful in obtaining the license in Fort Lauderdale, you will sell all of your stock in Raystay. Do I understand that that means you would give up your interest in the cable operations?
>
> [Gardner]: That is correct.
>
> [Adwave Counsel]: He has not said he would sell it. He said he may divest. Selling and divesting are not the same.
>
> [RKO Counsel]: Are you saying that the existing cable operations that you have now, you would have nothing further to do with them?
>
> [Gardner]: This is correct.
>
> [RKO Counsel]: When you say you will divest yourself of the stock, have you thought that through as far as what that would mean, what you intend to do?
>
> [Gardner]: I discussed it with my estate attorney and he has proposed a method of how to do it.
>
> [RKO Counsel]: Are you going to sell it to your family?
>
> [Gardner]: As I understanding, it, and I am certainly not very qualified, there is a trust arrangement that would be set for the benefit of that family.
>
> [RKO Counsel]: Would you be a trustee?
>
> [Gardner]: I don't know that that has been discussed.

It is notable that at the time of Gardner's deposition on April 29, 1985 (more than a year subsequent to the "B cut-off" date of March 29, 1984) Adwave's comparative posture in the proceeding had been altered dramatically. Three of the eight competing applicants had already dismissed their applications, thus leaving Adwave with competition from only five applicants. Of those five remaining applicants (South Jersey, Cozzin, Laudersea, First City Communications, Inc. (FCCI), and Florida Southern Broadcasting (FSB)), three (South Jersey, Cozzin and FCCI), had revealed that they intended to seek no integration credit, and FSB's counsel had withdrawn its representation. Additionally, Laudersea was facing petitions filed by RKO and Adwave that sought basic qualifying issues against Laudersea. Thus, it would not be unreasonable to posit that Adwave's divestiture

waffling had some foundation in fact. Perhaps Gardner realized that he would not have go give up his principal family-owned Raystay interests; he could retain the pastry and devour it, too.

[3] Adwave does correctly observe, however, that no disqualifying issue was involved in *Tequesta* while the instant case does involve a specific disqualifying issue added by the ALJ.

[4] It must also be noted that Reardon did not know whether WAXY had auxiliary power capability, and at the time she filed the amendment to her application on March 29, 1984, to stipulate that auxiliary power would be provided, she did not know what specific equipment would be required. (Adwave Ex. 8 at 17). She testified that she had an "estimate" of the cost involved but could not state the source of the estimate; she simply believed that it was "not an excessive sum of money." She merely stated in the March 29, 1984 amendment that she was financially qualified to provide this additional service. Also, on January 22, 1985, Reardon further amended her application to enlarge her proposed full-time staff and again certified her financial qualifications (Adwave Ex. 8 at 18-21). In January 1985, Reardon did not have written cost estimates for the construction and operation of the proposed station. The only information she had was the "ballpark" figures she had obtained earlier from Seibert and Joyce. She did not know what the additional costs of the enlarged staff would be. Her financial ability and understanding of the Commission's financial requirement were the same as when she originally filed her application. Reardon did not discuss her financial certification with anyone prior to her January 1985 amendment, and, in her additional amendment filed on July 12, 1985, Reardon *again* certified her financial qualifications (Adwave Ex. 8 at 29-30). Reardon still had no written cost estimates; the cost estimates she had in her mind, were "ballpark figures." Reardon clearly had no written budget or estimates of total costs of construction and operation of the station from the time she applied in May 1983 until the January 1986 hearing on her financial qualifications. (I.D., paras. 108-109).

[5] At hearing, Joseph Zingale first testified that his children (Tom, Nancy and Rozanne) were so interested in becoming personally involved in LPTV that they stayed in touch with Nightbyrd after his May 1983 Cleveland visit. However, on later cross examination, he admitted that Rozanne had not stayed in touch with Nightbyrd, and he did not know whether Nancy had or not (Tr. 3765-3766).

[6] In this *Second Report and Order, supra*, the Commission adopted Section 73.3521 of its Rules, 47 CFR §73.3521. That rule (violation of which was contemplated in the issue specified against Cozzin) provides as follows:

> When there is a pending application for a new low power television, television translator booster stations, or for major changes in an existing station, no other application which would be directly mutually exclusive with the pending application may be filed by the same applicant or by any applicant in which any individual in common with the pending application has any interest, direct or indirect, except that interests of less than 1% will not be considered.

The remaining two rules set forth in the issue specified against Cozzin (47 CFR §§73.3518 and 73.3520) provide as follows:

> § *73. 3518* ; *Inconsistent or conflicting applications* : While an application is pending and undecided, no subsequent inconsistent or conflicting applications may be filed by or on behalf of or for the benefit of the same applicant, successor or assignee.

> § *73. 3520* ; *Multiple Applications* : Where there is one application for new or additional facilities pending, no other application for new or additional facilities for a station of the same class to serve the same community may be filed by the same applicant, or successor or assignee, or on behalf of, or for the benefit of the original parties in interest. Multiple applications may not be filed simultaneously.

[7] Henry David Thoreau, *Journal* (1854).

[8] Even assuming, *arguendo*, that the "powers of attorney" were valid, Zingale violated 47 CFR §73.3513(b) because the individuals who purportedly granted the "powers of attorney" were not "physically disabled" or absent from the United States. Additionally, Zingale's "ignorance" of the rules provides no solace to Cozzin. As we have stated, "[i]t is usually impossible to objectively prove that an offender had a perfect knowledge of the law being violated." *Stearns County Broadcasting Co.*, 104 FCC 2d 688, 696 (Rev.Bd. 1986).

STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL CONCURRING IN PART; DISSENTING IN PART

Save for the fatal disqualification of Adwave, which would have otherwise easily prevailed in this "contingent" phase of the proceeding, I find no fault with the majority decision, concurring in those parts without comment. On Adwave's disqualification, which unjustly stigmatizes its president, George F. Gardner, a thoroughly forthright man, I respectfully dissent.

It is true, as the *Decision* observes (*ante* at para. 10), that Adwave's Gardner did initially pledge to "divest" all of the stock he (and his family) then possessed in several cable television companies, which companies hold cable franchises mostly in central Pennsylvania, more than a thousand miles from Ft. Lauderdale. However, the record is abundantly clear that, with an unselfconsciousness bespeaking a total lack of guile, Gardner volunteered at deposition that he actively considered effectuating his pledge by divesting the cable stock into some acceptable form of trust, thereby avoiding a taxable event on the outright sale of the stock.

His opponents, the ALJ, and now the majority grasp at the illusionary crack of daylight between Adwave's initial and unqualified pledge to divest the stock and his frank deposition testimony that he entertained (and, mercy, discussed with counsel) the notion of a trust as evidence of an intent to deceive the Commission, thereby to avert even the most minute media "diversification" demerit that would have attached to Gardner's distant cable interests.[1]

Because Gardner's spoken misgivings over a potential fee simple alienation of the cable stock, coupled to his honest revelation about preliminary discussions with counsel about divesting *into a trust* that might satisfy FCC concerns (however slight, *see supra* note 1), evince *anything but* an intent to deceive, the "blunderbuss of dis-

qualification"[2] is painfully misapplied to Adwave. To appreciate better the majority's misreading of the law, his conduct should be provided context.

First, and as noted in the margin, cable television interests are currently given scant attention under the rubric of mass media diversification. *Second*, nothing about Gardner's actions concerning those extant cable interests was furtive; he freely volunteered his slightly more refined intentions early at deposition (and long before the hearing), with neither prompting nor the extrinsic discovery of contradiction. *Third*, it is well-known that the Commission's media diversification focus has been rapidly, and relentlessly, evolving away from a concern with media ownership, *per se*, and solely toward media *control*. Thus, media equity ownership, *simpliciter*, is these days all but irrelevant to the Commission, which has afforded regulatees a plethora of insulative devices --including trusts -- to avoid the attribution of additional media ownership interests. *See Attribution of Ownership*, 97 FCC 2d 997, 1023-1024 (1984); 58 RR 2d 604 (1985)(*on reconsideration)* ; 1 FCC Rcd 802 (1986)(*clarification). See also Twentieth Holdings Corporation*, FCC 89-129, released May 16, 1989. There, the Commission approved a trust arrangement to satisfy its media diversification concerns over the common ownership of a major Boston newspaper and a co-located TV station (a combination actually prohibited by rule), even though --while it was an applicant -- that licensee had pledged unequivocally to "divest" the newspaper within 18 months. Now seeking "divestiture alternatives," the licensee proposed instead a trust to avoid the Commission's media diversification policies. The Commission there merely noted that the licensee was "abandoning its earlier plans to sell" the newspaper, *id.*, at para. 4, and it approved a modified trust arrangement. Nowhere did the *Twentieth Holdings* Commission intimate that the licensee had misrepresented in its initial, unconditional pledge to "divest" its conflicting media interest. And *fourth*, the record is plain that Gardner's thoughts and consular discussions about *how* to insulate himself from his cable interests in a manner that would (a) satisfy the FCC's very slight cable television diversity concerns, while (b) avoiding a taxable event were purely hypothetical at that stage, and remain so to this day. Had Adwave prevailed in this "contingent" contest (*hypothetically)*, or even (*hypothetically again)* over the incumbent RKO, and had the Commission demanded a better insulated trust than that (*hypothetically*, *tentatively*, and *speculatively)* entertained by Gardner, Adwave would have been constrained to comply. That's all.

The Board and the Commission do not lightly disqualify an applicant, and will forebear from such an extreme step for mere overstatement, *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132,1137-1143 (Rev. Bd. 1982), *aff'd*, 93 FCC 2d 127 (1983), or even a momentary misstatement, where any possible false impression is duly corrected without harm. *West Jersey Broadcasting Co.*, 90 FCC 2d 363, 369-370 (Rev. Bd. 1982). Indeed, the Commission itself has refused to disqualify an applicant who offered grossly false deposition testimony (and falsely certified its application), finding that these flaws did not reflect "a proclivity to dissemble" or warrant disqualification. *Broadcast Associates of Colorado*, 104 FCC 2d 16 (1986).[3]

This Board has not hesitated to disqualify applicants for stark dishonesty before the agency. *See, e.g., KQED, Inc.*, 3 FCC Rcd 2821 (Rev. Bd. 1988); *TeleSTAR, Inc.*, 2 FCC Rcd 5 (Rev. Bd. 1987), *aff'd*, 3 FCC Rcd 2860 (1988); *Catoctin Broadcasting Corp. of New York*, 2 FCC Rcd 2126 (Rev. Bd. 1987), *aff'd*, 4 FCC Rcd 2553 (1989); *Mid - Ohio Communications, Inc.*, 104 FCC 2d 572 (Rev. Bd. 1986). But these are cases of egregious misrepresentation and/or lack of candor. Here, the most for which Adwave is culpable is its minor failure to initially elucidate Gardner's terse pledge to "divest," a more complete explanation of which he ceded innocently in his early deposition testimony, and again at hearing. For his unstinting probity, Adwave receives the extreme penalty of disqualification, *compare Broadcast Associates*, *supra* (deposition containing "richly detailed fabrication" not disqualifying), because my colleagues insist on holding Gardner to the *strictest* and *most* literal interpretation of his initial, shorthand pledge to "divest" his cable television stock,[4] in which the Commission has little interest to begin with, *Greater Wichita, supra,* and which pledge Gardner, of his own volition, elaborated upon earnestly to opponents and the Commission alike, long before the hearing.

This is not nearly the stuff of utter disqualification,[5] but a perverse rebuff of Gardner's spontaneous rectitude. I hope the majority's error, so long as it remains uncorrected, does not encourage evasiveness and paltering by other applicants, who might perceive this injudicious disqualification as the exorbitant wages of simple truth.

FOOTNOTES FOR STATEMENT

[1] As noted most recently in *Religious Broadcasting Network*, 3 FCC Rcd 4085, 4086 & n. 4 (Rev. Bd. 1988), the Commission's view that cable system ownership is essentially *de minimis* in our comparative media diversification analyses is set forth in *Greater Wichita Telecasting, Inc.*, 55 RR 2d 926, 929 (1984). While the Board has several times suggested a reconsideration of that policy, now that cable television is considered a mature, powerful, and independent media voice, *Greater Wichita* yet controls our comparative adjudications.

Hence, even if Adwave had been fully charged with Gardner's (or the Gardners') cable television interests, it would have easily prevailed in this contingent phase of the instant proceeding.

[2] *WADECO, Inc. v. FCC*, 628 F2d 122, 133 (D.C. Cir. 1980)(Mikva, J., dissenting).

[3] *Reversing* 100 FCC 2d 616 (Rev. Bd. 1985).

[4] By analogy, we are taught that "the surest way to misinterpret a statute or a rule is to follow its literal language" without reference to the totality of the circumstances. *Viacom International, Inc., v. FCC*, 672 F.2d 1034, 1040 (2d Cir. 1982)(citing, *inter alia*, Judge Learned Hand). Had the majority regarded Gardner's divestiture pledge in context, and in conjunction with his elaboration at deposition rather than insisting on a literal reading of his initial language, no intent to deceive is possible. Only the obverse.

[5] Prior to a change in FCC policy which eliminated "comparative" character demerits, *see Broadcast Associates of Colorado, supra*, 104 FCC 2d at 18-19 & nn. 4, 5, Adwave might have received -- at most- - a slight comparative demerit for its failure (if any) to more fully refine its divestiture pledge at the very moment filed. *See, e.g., WADECO, supra* note 3, dissent of Judge Mikva.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-288

In re Applications of

NIRVANA RADIO BROADCASTING CORPORATION — File No. BPH-860203MH

VALLEY RADIO CORPORATION — File No. BPH-860203PC

For Construction Permit for a
New FM Station on Channel 264
in Christiansburg, Virginia

MEMORANDUM OPINION AND ORDER

Adopted: May 25, 1989; Released: June 6, 1989

By the Review Board: BLUMENTHAL, and ESBENSEN. Board Chairman MARINO not participating.

1. We return to an issue raised in our *Memorandum Opinion and Order*, FCC 89R-25, released April 21, 1989. There, we approved a settlement agreement between Nirvana Radio Broadcasting Corporation (Nirvana) and Valley Radio Corporation (Valley) in the above-captioned proceeding, subject to a condition that the parties notify the Board (within fifteen days of the release date of the *Order)* that they had modified, consistent with past Commission precedent, an accompanying covenant not to compete. The covenant, which restricts the dismissing applicants in this and a related Blacksburg, Virginia broadcast licensing proceeding (as well as Kenneth R. Strawberry, a common principal in both proceedings) from competing with either facility for a five year period, was deemed unacceptable by the Board insofar as it contained a clause which would, in essence, proscribe any submission to the Commission (by Nirvana or Strawberry) that might criticize the Christiansburg and Blacksburg facilities. We held that such a prohibition would prevent the dismissing parties from bringing to the Commission's attention any matter, however substantial, even when those parties may have evidence or a *bona fide* belief that the stations were violating the public interest. The parties have now filed an Addendum to the Covenant Not to Compete modifying the objectionable clause.[1]

2. In their covering letter to the Addendum, the parties state that the purpose of the Addendum is to meet the Board's concerns, while at the same time providing Valley some assurance that it will not be subject to "frivolous" litigation before the Commission. The Addendum deletes the referenced clause, substituting in its place a prohibition against the filing of applications for broadcast facilities in the subject communities for the prescribed period of time, which we indicated in our earlier *Order* would raise no objections. It adds, though, a new provision (in paragraph 9A) that would require Nirvana and Strawberry to reimburse Valley for costs and expenses incurred in defending against any FCC petition by them ultimately denied by the Commission.

3. We perceive no significant difference in the added provision from that of the original objectionable clause. In our previous order, we found that prohibitions against Commission filings such as complaints, informal objections, and petitions to deny, are fraught with "potential public interest detriment," insofar as such submissions are filed in good faith. Similarly, any monetary penalty for failure to prevail before the Commission continues to disserve the public interest because it discourages filings that might deeply implicate our regulations or the public interest. *See generally James S. Rivers, Inc.*, 26 FCC 4 (1959). Fortunately, the offensive Addendum contains a severability clause which provides that the covenant not to compete should be interpreted *as if* the reimbursement provision were not included therein, and without further need of ratification, should the Board declare invalid any portion of the Addendum. We shall, therefore, approve the Addendum without paragraph 9A, and declare the latter wholly invalid as against public policy.

4. ACCORDINGLY, IT IS ORDERED, That the Addendum to the Covenant Not to Compete filed May 4, 1989 by Nirvana Radio Broadcasting Corporation and Valley Radio Corporation IS APPROVED, except that Paragraph 9A IS STRICKEN.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTE

[1] A stamped copy of the Addendum was hand-delivered to the Board by the parties on May 17, 1989 after the Board was advised that the Addendum had been filed with the Commission's Office of the Secretary but had not been received in due course through the regular Commission distribution system.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

JAMES U. STEELE — **BC DOCKET NO. 81-307**
St. Simons Island, Georgia — File No. BPH-800930AE

DALE BELL — **BC DOCKET NO. 81-309**
St. Simons Island, Georgia — File No. BPH-801003AF

For Construction Permit for a
New FM Station

DALE BELL
Assignor

and — File No. BAPH-880728GQ

WBA PARTNERSHIP
Assignee

For Consent to Assignment
of Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: May 9, 1989; **Released: June 8, 1989**

By the Commission: Commissioner Quello concurring and issuing a separate statement.

1. Now before the Commission are: (a) a Joint Request for Approval of Settlement Agreement, filed August 9, 1988, by Dale Bell, James U. Steele, and WBA Corporation; (b) Application for Consent to the Assignment of Construction Permit for Authority to Construct a New FM Station at St. Simons Island, Georgia, filed July 28, 1988, by Dale Bell and WBA Partnership; (c) Joint Comments, filed October 31, 1988, by James U. Steele, Dale Bell, and WBA Corporation; (d) Reply Comments, filed November 10, 1988 by the Mass Media Bureau; (e) Further Comments, filed on November 22, 1988 by the Mass Media Bureau; (f) Amendment to Settlement Agreement, filed on December 28, 1988, by Dale Bell, James U. Steele, and WBA Corporation; and (g) Supplemental Comments, filed January 19, 1989, by Dale Bell, James U. Steele, and WBA Corporation.

I. BACKGROUND

2. This proceeding dates back to 1980, when Dale Bell, James U. Steele, Cannon's Point Broadcasting Company, and a fourth applicant (which dismissed its application before the hearing) filed mutually exclusive applications for a construction permit to construct and operate a new FM station in St. Simons Island, Georgia. Based upon its comparative criteria, the Commission determined that Bell was the best applicant, denied the competing applications filed by Steele and by Cannon's Point Broadcasting, and awarded Bell a construction permit for authority to construct a new FM station. *Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, recon. denied, 94 FCC 2d 72 (Rev. Bd. 1983), review denied, FCC 84-161 (Apr. 13, 1984), reaffirmed, 3 FCC Rcd 864 (1988).

3. Steele appealed the Commission's grant of a construction permit to Bell to the United States Court of Appeals for the District Columbia Circuit. *James U. Steele v. FCC*, Nos. 84-1176 and 88-1221 (D.C. Cir.). Cannon's Point Broadcasting did not appeal the Commission's decision, and the denial of its application for a construction permit is therefore final.

4. On July 26, 1988, Bell entered into agreements with Steele and with WBA Corporation, which is not a party to this proceeding, that will terminate this lengthy comparative proceeding. Under the agreements, Steele will dismiss his application for a construction permit with prejudice and withdraw his court appeal, and Bell will seek Commission consent to assign her construction permit to WBA Partnership, a partnership to be formed by WBA Corporation and Dale Bell. By its Order of August 10, 1988, the court remanded this adjudicatory proceeding to the Commission so that it may consider the proposed resolution of this proceeding.

5. We grant the Joint Request for Approval of Settlement Agreement and approve the Application for Consent to the Assignment of Construction Permit, subject to the condition set forth below. For the reasons that follow, we find that, consistent with 47 U.S.C. § 311(c) of the Communications Act and 47 C.F.R. § 73.3525 of the Commission rules, approval of the settlement agreement will serve the public interest by terminating this lengthy comparative proceeding and by expediting the initiation of new FM service to St. Simons Island.

II. THE SETTLEMENT AGREEMENT

6. Bell and Steele filed their applications more than eight years ago, and they first began litigating this matter in court in May 1984. The parties have now entered into a settlement agreement providing that Steele would dismiss his application for a construction permit and withdraw his court appeal, and that the Commission's April 13, 1984 decision granting Bell's application for a construction permit would become final.

7. Dale Bell and WBA Corporation have agreed to form WBA Partnership. Under the agreement, Bell will be a 49 percent partner and WBA Corporation will be a 51 percent partner. In consideration for its 51 percent interest in the construction permit, WBA Corporation will pay Bell 51 percent of her legitimate and prudent expenses in securing the construction permit for St. Simons Island.

8. WBA Partnership proposes to construct and operate the St. Simons Island station for at least one year after the station begins program tests. During the period ending one year after program tests begin, Dale Bell and WBA Corporation will contribute to the total capital needed to construct and operate the station according to their equity share in the partnership. In other words, Bell will contribute 49 percent of the station's expenses, and WBA will contribute 51 percent of the expenses. The agreement further specifies that Bell will serve as the station's Community Affairs Director for a minimum of fifteen months, and that she will receive $2,000 for her services each month.

9. From one year after the station begins program tests until five years after the station begins program tests, Bell may, upon 30 days' notice, exercise an option to sell to WBA Corporation her remaining 49 percent interest in the partnership. Whether to exercise the option to sell to WBA is totally within Bell's discretion: The agreement explicitly provides that WBA may not force Bell to sell at any time. Within 30 days after Bell exercises her option to sell, WBA will acquire her 49 percent partnership share, and she will enter into a covenant not to compete with WBA Corporation in the operation of the station.

10. If Bell does exercise her option to sell, WBA Corporation will, upon delivery of Bell's 49 percent partnership share and the non-competition agreement, pay Bell $231,750 as consideration for the covenant not to compete and for Bell's interest in the partnership. Bell will receive an additional $50,000 on each of the first three anniversaries of the closing date, and another $80,000 on the fourth anniversary of the closing date. Thus, Bell will receive payments totaling $461,750 if she exercises her option to sell. The agreement specifies that $320,000 is consideration for the non-competition agreement and the balance of the payments is consideration for Bell's 49 percent interest in the partnership.

11. Under the settlement agreement WBA Corporation will pay Steele $200,000 on the closing date to dismiss his permit application and withdraw his court appeal, and an additional $50,000 in consideration for his agreement not to compete with the St. Simons Island station. Under the covenant not to compete, Steele may not acquire a station, the transmitter of which is located within 25 miles of St. Simons Island. The amendment filed on December 28, 1989 modifies the covenant not to compete so that it expires after seven years. On each of the sixth and seventh anniversaries of the closing date, WBA Partnership will pay Steele an additional $25,000 for the covenant not to compete. Thus, Steele will receive payments totaling $300,000.

12. Although the agreement provides that WBA Corporation will make the above-described payments to Steele, the parties now agree to accept approval of the settlement agreement subject to the condition that WBA Partnership, and not WBA Corporation, will pay the $300,000 owed to Steele. *See* Joint Comments at 2-3. In accordance with the partnership agreement, Bell will contribute 49 percent of the payments to Steele, and WBA will contribute the remaining 51 percent. In order to secure the funds necessary to meet her partnership contributions, Bell will borrow the money from WBA Corporation. She will sign a note providing that she will repay the principal and interest five years after the station begins program tests or when Bell exercises her option to have WBA Corporation purchase her partnership interest, whichever is later. For the reasons set forth below, we grant the settlement agreement subject to the condition proposed by the parties.

A. ***Compliance with Section 311(c) of the Communications Act and Section 73.3525 of the Commission's Rules***

13. In order to approve the proposed settlement agreement under section 311(c)(3) of the Communications Act, we must determine that the agreement is consistent with the public interest, convenience or necessity, and that neither Steele nor Bell filed its application for the purpose of reaching or carrying out such an agreement. Pursuant to the further requirements of section 311(c) of the Communications Act and section 73.3525 of the Commission's rules, the parties submit a copy of the agreement among Bell, Steele, and WBA Corporation.

14. In addition, each party to the settlement agreement filed a statement under penalty of perjury. All three statements declare that approval of the settlement agreements will serve the public interest by eliminating the need for further proceedings before either the court or the Commission, thereby conserving the resources of the court, of the Commission, and of the parties, as well as expediting broadcast service to St. Simons Island. Statements from Steele and Bell further certify that their respective applications were not filed for the purpose of reaching or carrying out a settlement agreement, as section 311(c) of the Act and section 73.3525(a) of the Commission's rules require.

15. Bell's proposal to assign WBA Corporation a 51 percent interest in her construction permit for St. Simons Island is not an impediment to approving the settlement agreement. As an initial matter, the Commission has held that neither section 311(c)(3) of the Communications Act nor section 73.3525(a) the Commission's rules, which govern settlement agreements, prohibits third-party participation in settlements among competing applicants. *Rebecca Radio of Marco*, 4 FCC Rcd 830, 831 ¶ 11 (1988).

16. Furthermore, the fact that Bell will immediately assign a majority interest in her construction permit to WBA Corporation does not preclude the Commission from approving the agreement among Bell, Steele, and WBA Corporation. We recognize that the Commission generally grants "construction permits . . . 'only to qualified applicants who have. . . [a] bona fide intention to construct their proposed facilities and render a broadcast service.'" *Scott & Davis*, 54 RR 2d 868, 869 ¶ 4 & n.7 (1983) (quoting *Northeast TV Cablevision*, 21 FCC 2d 442, 443 ¶ 3 (1970)).

17. This case, however, is clearly distinguishable from the *Scott & Davis* line of cases. Although Dale Bell will not have a majority interest in the ultimate permittee, it is nevertheless clear that Bell has "a bona fide intent to construct [her] proposed station," as Commission precedent requires. Under the express terms of the settlement agreement, Bell will have a management position at the station for at least 15 months. More importantly, the settlement agreement provides that Bell will retain a 49 percent interest in the construction permit, and that Bell and WBA Corporation will jointly construct and then operate the station for at least one year after the station begins program tests.

18. During the period ending one year after the station begins program tests, Bell is legally obligated, under the settlement agreement, to contribute 49 percent of the station's expenses. After that time, Bell may exercise her option to sell her 49 percent partnership interest to WBA Corporation. But WBA Corporation may not force Bell to sell her interest in the station at any time. Thus, the settlement agreement does not place any restriction on Bell's ability to construct and operate the proposed FM station indefinitely. Although the agreement specifies that Bell is to be paid $461,750 if she sells her 49 percent partnership share to WBA Corporation, whether Bell actually receives this money will depend upon a number of variables that are ultimately outside of Bell's control. For example, even if she chooses to exercise the option after one year, she would get nothing if the station went dark before the one-year period expired.

19. In other words, it is by no means certain that Bell will realize significant financial gain as a result of her agreement with WBA Corporation. Rather, it is clear that, Bell, as a 49 percent partner in the permittee, will share in the financial risks, as well as the profits, associated with constructing and operating the proposed station in St. Simons Island. In view of the size of Bell's retained equity in the permittee, her legal obligation to contribute 49 percent of the station's expenses, and the uncertainty of her receiving the $461,750, we find that Bell has the "bona fide intention to construct and operate the proposed station," as the *Scott & Davis* line of cases requires.

B. ***Public Interest Considerations***

20. We conclude that approval of the settlement agreement in this case serves the public interest. There is no broadcast facility currently licensed to serve St. Simons Island. The pending applications were filed more than eight years ago, and the case was first appealed to the court in 1984. In the absence of a settlement agreement, final resolution of this already protracted adjudicatory proceeding could involve additional litigation. This would further delay the initiation of new broadcast service for St. Simons Island. Such delay disserves the public interest.

21. As discussed in paragraph 42 below, WBA Corporation has the basic qualifications to be a Commission licensee. Thus, approving the proposed settlement agreement will end a proceeding that has been going on for more than eight years, conserve the resources of the court, the Commission, and the private parties, and expedite the commencement of St. Simons Island's first broadcast service. Under these circumstances, we conclude that approving the agreement, whereby Steele will dismiss its application, and Bell will assign a 51 percent interest in the construction permit to WBA Corporation, will serve the public interest.

C. ***Compliance with the Commission's Anti-trafficking Rules***

22. The agreement provides that WBA Corporation will make various payments to Bell and to Steele. For the reasons that follow, we find that these payments do not violate our anti-trafficking rules, and we approve the agreement subject to the condition that it be amended to provide that WBA Partnership (rather than WBA Corporation) will make the payments to Steele and that Bell will contribute to the Steele payments in proportion to her equity interest in the partnership.

23. The Commission's anti-trafficking rules prohibit the seller of a construction permit for an unbuilt station from receiving more than its legitimate and prudent expenses in securing the construction permit. *See* 47 C.F.R. § 73.3597(c)(2).[1] Moreover, the rules specifically permit the seller of a construction permit to retain an equity interest in an unbuilt station if the seller obligates himself to provide, for at least a year after the station begins program tests, "that part of the total capital made available to the station . . . which is proportionate to the seller's equity share in the permittee." *See* 47 C.F.R. § 73.3597(d)(2).

1. Consideration Paid to James U. Steele

24. *Payments to Steele:* On the closing date, WBA Corporation will pay Steele $200,000 to dismiss his application and withdraw his court appeal, and $50,000 to enter into a covenant not to compete with the St. Simons Island station. As additional consideration for Steele's agreement not to compete with the St. Simons Island station, WBA Corporation will pay Steele $25,000 on the sixth and seventh anniversaries of the closing date.

25. The payments to Steele do not constitute trafficking within the meaning of section 73.3597 of our rules. Based upon our comparative criteria, we granted Bell's application for a construction permit for St. Simons Island on April 13, 1984. Because Bell, and not Steele, has a construction permit, Steele has nothing that it can assign or transfer to WBA Corporation. Thus, Steele is not being compensated for the transfer of a broadcast interest. Instead, Steele is being compensated only for the dismissal of his application and the withdrawal of his court appeal. In this respect, the payments to Steele violate neither the letter nor the spirit of the anti-trafficking rules.

26. From a public interest standpoint, we discern no meaningful distinction between a non-party paying Steele to dismiss his application, and an ordinary settlement agreement among competing applicants where one applicant gets a construction permit after paying competing applicants to dismiss their applications. In an ordinary settlement among or between competing applicants, dismissing applicants are not limited to recovering only legitimate and prudent expenses. *See Agreements in Broadcast Proceedings*, 53 RR 2d 823, 825 ¶ 5 (1983).

27. As noted in paragraph 15 above, we do not prohibit non-parties from participating in settlement agreements among competing applicants. Thus, we find that, as long as the ultimate permittee is fully qualified to be a Commission licensee, a settlement agreement that expedites the initiation of new broadcast service serves the public interest, regardless of whether the entity compensating the dismissing applicants is a party to the comparative proceeding. Accordingly, the public interest is not contravened by permitting a non-party to compensate Steele for dismissing his application and court appeal.

2. Consideration Paid to Dale Bell

28. *Initial Payment to Bell:* As consideration for its 51 percent interest in the permittee, WBA Corporation will only pay Bell 51 percent of her legitimate and prudent expenses in securing the construction permit for St. Simons Island. This is in compliance with section 73.3597(c)(2), which specifies that "[t]he FCC will not consent to the assignment of a construction permit . . . of an unbuilt station if the agreements . . . between the parties provide for, or permit, payment to the seller of a sum in excess of the aggregate amount clearly shown to have been legitimately and prudently expended. . . by the seller solely for preparing, filing, and advocating the grant of a construction permit for the station . . . ."

29. The agreement between Bell and WBA Corporation specifies that the purchase price of the 51 percent interest in the permittee will be $38,250, or a lesser amount that the Commission may approve. Bell certifies that the $38,250 represents "51 percent of all reasonable and actual expenses legitimately and prudently incurred by Bell in the preparation and prosecution of her application for the Permit." *See* Settlement Agreement at ¶ 7(a). The agreement further provides that on the closing date, WBA will make this payment to Bell, and Bell will deliver the 51 percent interest in the permittee to WBA Corporation. *Id.* at ¶ 7(b).

30. Pursuant to section 73.3597(c)(3), Bell and WBA Corporation have submitted declarations under penalty of perjury certifying that there are no other understandings or agreements for the reimbursement of Bell's expenses or other payments to Bell. Bell also submits an itemization of out-of-pocket expenses, as section 73.3597(c)(3)(ii) requires. Based upon our examination of the itemization, we conclude that $38,250 represents 51 percent of Bell's legitimate and prudent expenses. Thus, the proposal that WBA Corporation pay Bell $38,250.00 in exchange for a 51 percent interest in the permittee complies with the limitation on consideration for the sale of a construction permit for an unbuilt station specified in section 73.3597(c)(2) of the Commission's trafficking rules.

31. *Indirect Payments to Bell:* As noted above in paragraph 11, the proposed settlement agreement provides that WBA Corporation will pay Steele $200,000 to dismiss his application and to withdraw his court appeal, and an additional $100,000 to enter into a covenant not to compete with the proposed FM station in St. Simons Island.

32. In comments filed on October 31, 1988, the parties to the agreement argue that the payments to Steele should not be construed as a benefit to Bell in excess of her receipt of legitimate and prudent expenses in assigning her 51 percent share to WBA Corporation, contrary to section 73.3597(c). Asserting that no monetary value can be placed on Steele's promises to withdraw its application and to enter into a covenant not to compete, the parties further contend that Bell will not realize any financial gain as a result of the payments to Steele. According to the parties, WBA Corporation's promise to pay Steele to dismiss his permit application is independent of the partnership agreement with Bell and of its promise to pay Dale Bell 51 percent of her expenses in exchange for a 51 percent interest in the permittee.

33. Nevertheless, as noted above, the parties indicate that they are willing to amend the agreement to require that WBA Partnership, and not WBA Corporation, pay the $300,000 owed to Steele. Joint Comments at 2-3. In view of the parties' willingness to amend the settlement agreement in this manner, we need not address this matter further. Under the amendment, Bell is clearly not receiving any benefit for which she has not paid. In order to expedite resolution of this complicated proceeding, we approve the settlement agreement subject to the condition that the agreement is modified to provide that WBA Partnership (and *not* WBA Corporation) will pay the full $300,000 owed to Steele, and that, in accordance with the partnership agreement, Bell will be legally obligated to contribute at least 49 percent of this amount. The proposed modification, which contemplates that Bell, through a bona fide loan from WBA Corporation, will borrow the funds necessary to meet her partnership contribution, complies fully with the anti-trafficking rules.

34. *Bell's Option to Sell:* As stated above, once the station has been on the air for a full year after it commences program tests, Bell has the option of requiring that WBA Corporation buy her 49 percent partnership interest. *See* Settlement Agreement at ¶¶ 7(c)(i) and 7(c)(iii). If Bell exercises her option to sell, WBA Corporation will, within 30 days, acquire Bell's interest and Bell will enter into an agreement not to compete with WBA Corporation in the operation of the station. *Id.* at ¶ 7(c)(ii). As consideration for the Bell's 49 percent partnership interest and Bell's agreement not to compete, WBA Corporation will pay Bell $231,750 and an additional $230,000 over the next four years. *Id.*

35. This provision complies fully with section 73.3597(d)(2), which allows the seller to retain an equity interest in an unbuilt station provided that the seller is obligated to contribute "for the period ending 1 year after commencing program tests, . . . that part of the total capital made available to the station, up to the end of that period, which is proportionate to the seller's equity share in the permittee . . . . " In accordance with this requirement, the settlement agreement requires that Bell contribute 49 percent of the station's expenses and permits Bell to exercise the option to sell one year after the station commences program tests.

D. *Covenants Not to Compete*

36. *Steele's Covenant Not to Compete:* The settlement agreement provides that on the closing date Steele shall enter into an agreement not to compete with the proposed station by acquiring any interest in a station that has a transmitter within 25 miles of St. Simons Island. Although the covenant not to compete originally did not specify a time limit, the parties submitted an amendment, which we accept, that modifies paragraph 8 of the settlement agreement to provide that Steele shall enter into a covenant not to compete with WBA for seven years. The amended covenant accords fully with Commission precedent that covenants not to compete that are not limited in duration and geographic scope are inherently suspect. *See Intercontinental Radio, Inc.*, 62 RR 2d 1565, 1567-68 ¶¶ 5-8 (1985).

37. *Bell's Covenant Not to Compete:* Paragraph 7(c)(ii) of the settlement agreement provides that if Bell exercises her option to sell her partnership interest to WBA Corporation, "Bell shall enter into an agreement not to compete with WBA [Corporation] in the operation of the Station." The terms of Bell's covenant not to compete are not set forth in the settlement agreement. However, the parties submitted an amendment modifying the settlement agreement to specify that "Bell shall enter into an agreement not to compete with WBA [Corporation] in the operation of the Station by acquiring at any time within seven (7) years any interest in a station the transmitter of which is located within 25 miles of the reference point for St. Simons Island." The amended Bell covenant accords fully with Commission precedent that such covenants be reasonably limited in geographic scope and duration. Of course, our approval of the settlement agreement is subject to any further limitations under applicable local law as to the duration, geographic scope, and enforceability of the covenants not to compete binding Bell and Steele.

E. *Conclusion*

38. In view of the foregoing, we find that approval of the proposed settlement agreement contravenes neither the Communications Act, the Commission's rules, nor any Commission policy. We find further that approval of the agreement serves the public interest by expediting service to St. Simons Island, which currently has no broadcast service, and by conserving the resources of the parties and of the Commission. Because we conclude, as set forth in paragraph 42 below, that WBA Partnership is fully qualified to be a Commission licensee, we approve

the pending assignment application, approve the settlement agreement, and terminate this lengthy adjudicatory proceeding.

39. In taking this action, we note that the rationale set forth in *Rebecca Radio* supports our approval of the settlement agreement. In *Rebecca Radio*, the Commission approved a settlement agreement in an adjudicatory proceeding, whereby a third-party received a construction permit in exchange for compensating the competing applicants to dismiss their pending applications. In approving the agreement in *Rebecca Radio*, the Commission reasoned that the original applicants, by entering into the settlement agreement, had effectively declared that they were no longer interested in litigating the right to serve Marco. Accordingly, the Commission concluded that "proceed[ing] with comparative hearings, in the face of an agreement contemplating a grant to a qualified applicant, would be a significant waste of time and would needlessly delay the institution of service to Marco." *Rebecca Radio*, 4 FCC Rcd at 832 ¶ 19. It further held that "as long as the ultimate permittee is qualified, a settlement agreement that expedites the initiation of new broadcast service serves the public interest, regardless of whether the entity compensating the dismissing applicants is a party to the comparative proceeding." *Id.* at ¶ 27.

40. The agreement that the Commission approved in *Rebecca Radio* was structured somewhat differently than the agreement which we approve today in the St. Simons Island proceeding. In the Marco proceeding, the applicants requested that the Commission accept an amendment substituting a third-party for one of the original applicants in the adjudicatory proceeding, approve the settlement agreement dismissing the other pending applications, and grant the amended application. Here, however, the parties seek Commission approval for the assignment of Bell's construction permit to WBA Partnership, of which Bell will be a 49 percent partner.

41. Despite these differences, the effect of the two settlement agreements is identical. In both cases, an entity that was not an original applicant in the adjudicatory proceeding acquires a majority interest in a construction permit in exchange for compensating any remaining applicants to dismiss their applications. Clearly, the public interest considerations that support approving an agreement whereby none of the original applicants receives any interest in the construction permit also support approving an agreement whereby one of the original applicants retains a 49 percent interest in the construction permit.[2]

III. THE ASSIGNMENT APPLICATION

42. In accordance with 47 C.F.R. §§ 73.3573 and 73.3580(b) of the Commission's rules and 47 U.S.C. § 309(b) of the Communications Act, the Bureau on August 17, 1988 issued a public notice of the acceptance for filing of an application to assign the construction permit from Dale Bell to WBA Partnership. The Bureau received no petitions to deny the assignment application. Based upon the Bureau's review of the assignment application, filed on July 28, 1988 by Bell and WBA Partnership, we conclude that WBA Corporation is basically qualified to be a Commission licensee, and that the public interest will be served by granting the parties' assignment application.

IV. ORDERS

43. ACCORDINGLY, IT IS ORDERED, That the Amendment filed December 28, 1988 by Dale Bell, James U. Steele, and WBA Corporation IS ACCEPTED.

44. IT IS FURTHER ORDERED, That, subject to the condition set forth in paragraph 45 below: (1) the Joint Request for Approval of Settlement Agreement, filed August 9, 1988 by Dale Bell, James U. Steele, and WBA Corporation, IS GRANTED and the attached Settlement Agreement IS APPROVED; (2) the application filed by James U. Steele (File No. BPH-800930AE) IS DISMISSED with prejudice; (3) the adjudicatory proceeding in BC Docket Nos. 81-307 and 81-309 IS TERMINATED; and (4) the Application for Consent to the Assignment of Construction Permit for Authority to Construct a New FM Station at St. Simons Island, Georgia (File No. BAPH-880728GQ), filed July 28, 1988, by Dale Bell and WBA Partnership IS GRANTED and the Construction Permit IS ASSIGNED to WBA Partnership.

45. IT IS FURTHER ORDERED, That prior to the closing date Dale Bell, James U. Steele, and WBA Corporation SHALL MODIFY Paragraph 7(b) of the above-described settlement agreement to provide that the $300,000 payment to Steele is an obligation of the WBA Partnership (and *not* an obligation of WBA Corporation), and that Dale Bell is legally obligated to contribute that portion of the Steele payment which is proportionate to her equity share in the permittee.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] We find that section 73.3597(c)(2), and not section 73.3597(a)(1), governs the proposed settlement agreement. Section 73.3597(a)(1) of the Commission's rules specifies that an assignment application will be designated for hearing if the station has been operated on-air by the current permittee for less than one year and the permit or license was authorized "after a comparative hearing." Under section 73.3597(b), the one-year holding period runs from the date on which the station initiates program tests until the transfer application is filed. However, whether we construe the award to be after a settlement agreement or as the result of a comparative hearing, program tests have not commenced or been authorized. Thus, in any event, it is section 73.3597(c)(2) that governs the proposal that Bell assign the construction permit to a partnership in which WBA Corporation will hold a 51 percent interest and Dale Bell will hold a 49 percent interest. *See TV-8, Inc.*, 2 FCC Rcd 1218, 1220 ¶ 16 (1987), where the Commission confirmed that the one-year holding period does not apply to stations that have not begun operating.

[2] In Supplemental Comments, filed on January 19, 1989, the parties state that they are willing to amend their settlement agreement to conform to the *Rebecca Radio* model, if so directed. The parties also indicate that they remain willing to amend the settlement agreement to eliminate any question as to excess compensation to Bell under section 73.3597. The parties further indicate that the expeditious consideration of the settle-

ment agreement is necessary if the parties are to maintain their settlement posture. An amendment revising the settlement agreement to conform to *Rebecca Radio* would require that the parties publish local notice under 47 U.S.C. § 73.3580. This would further delay Commission action on the proposed settlement agreement. Because time is critical here, we grant the settlement agreement subject to the condition set forth in paragraph 45 below.

Concurring Statement
of
Commissioner James H. Quello

Re: Settlement Agreement in the St. Simons Island, Georgia FM Proceeding. (MM Docket Nos. 81-306, 81-307, and 81-309).

I concur in the decision to approve the settlement in this case. However, I must part company with the majority's sweeping approach. The breadth of the majority's opinion is yet another step in the Commission's attempt to turn our comparative process into a private *de facto* auction. *See Rebecca Radio of Marco,* 4 FCC Rcd 830, 835 (January 19, 1989) (Quello, dissenting).

The majority holds that Section 73.3525 of our rules encompasses third party settlements. While I would agree that Section 311(c) of the statute does not expressly preclude third party settlements, it is incorrect to conclude that our rules routinely encompass these types of settlements, absent a waiver. Indeed, a careful reading of 73.3525(a) demonstrates that the rule was intended to apply only to entities that had applications pending before the Commission. *See Order,* 53 R.R.2d 823 (1983); *Report and Order,* 20 R.R.2d 1613, 1614 (1970); *Report and Order* in Docket No. 12504, 20 R.R. 1669, 1672 (Jan. 13, 1961). Construing Section 73.3525(a) to encompsss third party settlements makes a mockery of the Commission's administrative process. For example, there is no need to comply with the Commission's rules governing filing deadlines because any party can join a comparative hearing at any time for the purpose of reaching a settlement. In particular, the rules governing amendments to applications become superfluous if third parties can become part of the comparative process at any time. *See* 47 C.F.R. § 73.3522. Moreover, the majority's construction renders our rules governing the requirements for the acceptance of applications a nullity. *See* 47 C.F.R. § 73.3564. The interpretation of Section 73.3525(a) is at best strained and is simply inconsistent with our carefully structured applications procedure.

There is also the question of whether the settlement agreement is consistent with the Commission's policy to grant construction permits only to qualified applicants who have a *bona fide* intention to construct the proposed facility. *See Scott & Davis,* 54 R.R.2d 868, 869 (1983). The majority attempts to distinguish this case from *Scott & Davis* because Dale Bell retains a 49 percent interest in the partnership. However, WBC Corporation will have *de jure* control over the license. Moreover, it is the partnership, not Dale Bell that intends to build and operate the station. Bell's lack of control, when coupled with the option agreement that may force WBA Corporation to purchase her interest, does not support the contention that she intends to build and operate the station. In addition, I am simply not persuaded that the "financial uncertainty" and obligation to contribute towards expenses during the one year - holding period is sufficient evidence of "intent" to outweigh the obvious fact that she is transferring *de jure* control of the construction permit to WBC Corporation. This is especially true where Bell is borrowing the money from WBC Corporation to pay expenses during the one year holding period.

I am not convinced that this situation is not a sale "for profit." While Bell's option agreement cannot be exercised prior to one year after program tests have commenced, the option agreement itself gives Bell *present* legal rights. For example, Bell might have legal recourse in contract against WBC Corporation for any action that would undermine the value of the option. This is not the case where a seller simply desires to retain an equity interest with no legal expectancy of subsequent sale for "profit" to the buyer.

On balance, the settlement before us does not comply with our anti-trafficking policy. *See* 47 C.F.R. § 73.3597. The majority reads Section 73.3597(d)(2) to allow the holder of a construction permit to transfer a controlling interest in the construction permit to a third party so long as the seller retains an equity interest in the facility and contributes a proportionate share towards capital investment and expenses for at least one year. The majority, however, ignores the obvious "for profit" arrangement that is based on the option agreement between the parties. In my opinion, this business structure pushes the technical limit of Section 73.359(d)(2)(d) and, most certainly, undermines the spirit of the provision. I simply cannot accept such a strained construction of our rule.

I absolutely disagree with the majority's assertion that there is "no meaningful distinction between a nonparty paying Steele to dismiss his application and an ordinary settlement agreement among competing applicants." *See Memorandum Opinion and Order* at para. 26. It is precisely this logic that leads to the creation of a private auction, thereby undermining the entire comparative process and our public interest responsibilities. I would remind the majority that the Commission does not have auctioning authority under the existing statutory scheme. The sweeping language of the Commission's decision is a blatant attempt to turn our settlement process into a private auction.

Nevertheless, I am willing to approve the settlement on a rather narrow, limited basis. Unlike *Rebecca Radio of Marco,* which involved a third party settlement after designation but prior to an evidentiary hearing, the parties have litigated the instant case for approximately ten years. They have faithfully prosecuted their applications through the agency and court of appeals. I find this distinction important. Third party settlements in cases that have been subject to lengthy proceedings do not raise the spectre of a *de facto* auction. I doubt very much that most applicants would be willing to wait a decade or more simply to find a third party to purchase their applications or unbuilt construction permits. In other contexts, the Commission has treated applicants that have gone through the hearing process differently from applicants attempting to settle prior to a hearing. *See First Report and Order* in BC Docket No. 81-742, FCC 89-108 (released May 16, 1989) (allowing settlement agreements for expenses after an Initial Decision, but preventing payment prior to the Initial Decision). Viewed in this light, approving the settlement on the facts in this case does not set a dangerous precedent for the private *de facto* auctioning of spectrum.

The settlement does promote the public interest, however, by avoiding further proceedings in this case, thereby facilitating service to St. Simons Island. Accordingly, I would be willing to waive the requirements of Section 73.3597 and approve the settlement. *See e.g., In Re: RKO General, Inc.*, 3 FCC Rcd 5057, 5063 (1988). This approach is preferable to the majority's broad and sweeping construction of our rules and most importantly avoids construing them in such a manner as to create a *de facto* auction under the guise of a settlement.

I recognize this approach allows settlements only in cases that are lengthy, where the Commission has already expended significant efforts. While some may argue that it wastes the Commission's resources, I find it preferable to the majority's approach which undermines our applications process and leads to a *de facto* auctioning of broadcast licenses. After all, the Commission's fundamental obligation under the Communications Act is to select licenses for broadcast stations. Efficiency and speed of selection should not be the sole criteria for our administrative process. Our duty to choose those who serve as public trustees of full service broadcast facilities goes beyond that of a mere auctioneer.

Because the issues raised in these cases goes to the very heart of our licensing process, we should address them in the context of a rulemaking. Unfortunately, the Commission has not solicited public comment on the extraordinary procedures employed in the instant proceeding as well as those in *Rebecca Radio of Marco*. I again request that the Commission commence a rulemaking proceeding. *See Petition for Rulemaking* filed by National Association of Broadcasters, February 22, 1989. This issue is too important for us to develop on a case-by-case basis. A rulemaking would allow us to consider all the policy implications of this novel procedure. Hopefully, we will commence such an examination as soon as possible.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

AMERICAN TELEVISION AND COMMUNICATIONS CORPORATION — CSR-3186

Petition for Special Relief

MEMORANDUM OPINION AND ORDER

Adopted: May 26, 1989; Released: May 26, 1989

By the Chief, Mass Media Bureau:

1. On April 10, 1989, American Television and Communications Corporation (hereinafter "ATC"), a multiple cable television system operator, filed a petition for special relief seeking temporary relief from the provisions of Section 613(a) of the Communications Act of 1934, as amended,[1] and Section 76.501(a)(2) of the Commission's Rules, concerning common ownership of colocated cable television systems and television broadcast stations. ATC's petition is unopposed.

2. ATC is an 82%-owned subsidiary of Time Incorporated (hereinafter "Time").[2] Pursuant to a March 3, 1989, Agreement and Plan of Merger, Warner Communications Inc. (hereinafter "WCI") will merge with a wholly owned subsidiary of Time, with WCI surviving and becoming a wholly owned subsidiary of Time, which will be renamed Time Warner Inc. (hereinafter "Time Warner"). Special relief is necessary, states ATC, because several cross-interests resulting from the merger would be inconsistent with Section 76.501(a)(2) of the Commission's Rules, due to the following circumstances, as outlined by ATC.

3. ATC owns cable systems serving Canyon County, California; Orange, California; San Marino, California; South Pasadena, California; and Austin, Texas, as well as neighboring communities. In addition, ATC holds a 50% general partnership interest in Paragon Communications, which owns cable systems serving Gardena and Torrance, California, and neighboring communities. The California systems lie within the predicted Grade B contour of Station KCOP(TV) (Ind., Channel 13), Los Angeles, California, and the Texas system lies in part within the predicted Grade B contour of Station KMOL-TV (NBC, Channel 4), San Antonio, Texas. Both KCOP(TV) and KMOL-TV are controlled, through subsidiaries, by BHC, Inc. (hereinafter "BHC"). The single majority shareholder of BHC is Chris Craft Industries, Inc. (hereinafter "CCI"). CCI and affiliates currently hold 15.5% of the voting power of WCI, and are expected to hold approximately 12.1% of the voting power of Time Warner following the merger.[3] Accordingly, the planned merger will result in cognizable cross-interests, through CCI's interest in KCOP(TV) and KMOL-TV and ATC's interests in the aforementioned California and Texas cable systems.

4. In support of its requests for special relief, ATC notes that while CCI will have a cognizable ownership interest in ATC through CCI's ownership of Time Warner stock, there will be no cross-officer or cross-director interests among CCI, BHC, Time Warner and ATC. Accordingly, states ATC, "neither CCI nor its subsidiary, BHC, on the one hand, nor Time Warner and ATC on the other, will be in a position to control or dictate the operations of the other's media properties." ATC argues that the facts herein are indistinguishable from those in *Storer Communications, Inc.*, 59 RR 2d 611 (1985) and *Golden West Associates, L. P.*, 59 RR 2d 125 (1985), in which the parties were granted eighteen-month periods within which to come into compliance with the cross-ownership rules. ATC contends that, as in those cases, the number of affected cable subscribers in both the Los Angeles and Austin areas represent *de minimis* segments of the television markets in question.[4] In both areas, there is an abundance of competing broadcast and other media outlets, including multipoint distribution systems, multichannel multipoint distribution systems, low power television stations, movie theaters, video cassette rental stores, satellite master antenna television systems, as well as daily and weekly newspaper and other publications.[5] Furthermore, ATC maintains that immediate divestiture could result in "fire sales" of the affected systems, depriving system owners of fair returns on their investments and lessening the likelihood of local or minority buyers obtaining access to sufficient capital to bid successfully on the properties being divested. In addition, ATC notes the complexities and time-consuming nature of selling cable systems in large markets, particularly given the need for approvals by local authorities. Accordingly, ATC requests a period of eighteen months within which to come into compliance with Commission requirements.

5. We find the Commission's precedent in *Golden West Associates, L. P., supra*, to be controlling. Given the facts before us, we perceive no public interest benefit in removing cable service to the many communities involved in this matter until a buyer or buyers can be found. The alternative would be to hold up a major transaction of which the cable systems constitute but a very small part. Furthermore, in view of the abundance of media serving the Los Angeles and Austin areas, we do not believe that any long-term, undue harm will result from permitting a short period of time following consummation of merger to come into compliance. Nor do we believe that Congress intended to require "fire sales" as a result of the need to divest properties quickly after Commission approval of complex transfers, but before consummation of the transaction. In view of the foregoing, and given the nature of the transaction, we believe that an eighteen-month period of time from the date of consummation of the merger, is sufficient for the parties to come into compliance.

6. In view of the foregoing, we find that a grant of ATC's petition, to the extent indicated herein, is in the public interest.

7. Accordingly, IT IS ORDERED, That the petition for special relief (CSR-3186), filed April 10, 1989, by American Television and Communications Corporation, IS GRANTED to the extent indicated in paragraph 5, *supra*, effective May 26, 1989.[6]

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

FOOTNOTES

[1] 47 U.S.C. Section 533 (a).

[2] ATC has both Class A and Class B common stock, the former having one vote per share and the latter having three votes per share. Time owns all of ATC's Class B common stock, representing 82% of ATC's total outstanding shares and 93% of the combined voting power of the common stock.

[3] Initially, ATC had stated that CCI and its affiliates would hold a 15.6% post-merger interest in Time Warner, and also noted that common officers and directors would exist among Time Warner and BHC. In a supplementary letter filed on May 24, 1989, however, ATC stated that as a result of a settlement of disputes between WCI and CCI, WCI will dispose of its minority ownership interest in BHC, and certain directors of WCI and BHC have resigned, eliminating the potential for common director interests.

[4] ATC includes an engineering statement which, it argues, demonstrates that KMOL-TV's predicted Grade B contour overlaps only approximately 18% of the area served by the Austin, Texas cable system. ATC further contends that there may be no actual Grade B contour overlap, but seeks the instant special relief to avoid delaying the proposed merger. ATC also suggests that KMOL-TV primarily serves San Antonio residents, not Austin residents, and that the two cities constitute separate Standard Metropolitan Statistical Areas and Arbitron Areas of Dominant Influence.

[5] This multiplicity of diverse and independent media voices in the Los Angeles area has previously been recognized by the Commission, notes ATC, citing *Metropolitan Theaters Corporation* 85 FCC 2d 1004, 1008 n.11 (1981).

[6] Also effective May 26, 1989, are our actions granting numerous related CARS authorizations.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re: Application of

ROBERT G. CORY File No. BPFT-870707TB

For Construction Permit for
a New FM Broadcast Translator
Station to Serve Redding and
Anderson, California

ORDER

Adopted: February 15, 1989; Released: June 12, 1989

By the Commission: Commissioner Quello issuing a separate statement.

1. The Commission has before it for consideration an application for review, filed May 23, 1988, by Price Broadcasting Company ("Price"); an opposition to application for review, filed June 7, 1988, by Robert G. Cory ("Cory"); and a reply to opposition to application for review, filed June 22, 1988, by Price.

2. On July 7, 1987, Cory filed an application for authority to construct the subject commercial FM translator station. On October 26, 1987, Price filed a petition to deny Cory's application. By letter dated December 21, 1987, the Chief, Audio Services Division, Mass Media Bureau, determined that Price did not have standing to file a petition to deny the Cory application because, at the time Price filed its petition to deny, Price was merely the proposed assignee for stations KQMS(AM) and KSHA-FM, Redding, California. Nevertheless, the merits of Price's pleading were considered as an informal objection and denied. *See Syracuse Channel 62, Inc.*, 60 Rad. Reg. 2d (P&F) 1161 (1986); *WIBF Broadcasting Co.*, 17 FCC 2d 876 (1969). On January 21, 1988, Price filed a petition for reconsideration of the action of December 21, 1987. By letter dated April 22, 1988, the Chief, Audio Services Division, determined that the consummation of the assignments of licenses for KQMS(AM) and KSHA-FM on December 9, 1987, did not retroactively confer standing on Price to file a petition to deny. The Chief also determined that Price lacked standing to file a petition for reconsideration because informal objectors do not have standing to file petitions for reconsideration. Price's petition for reconsideration was therefore dismissed.

3. Irrespective of Price's status in this proceeding, the Bureau carefully considered the merits of Price's informal objection. Neither the application for review nor the petition for reconsideration filed by Price offered any new facts or changed circumstances which were not considered when the informal objection was denied. Price simply restates the arguments made earlier regarding operation of the proposed translator on a for-profit basis.[1] Reconsideration or review will not be granted merely for the purpose of again debating matters upon which a decision has been made. *See* WWIZ, *Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); *WEOK Broadcasting Corp.*, 4 Rad. Reg. 2d (P&F) 503 (1965). We have reviewed the Bureau's action denying the informal objection and dismissing the petition for reconsideration and find no substantive error. Accordingly, pursuant to 47 C.F.R. § 1.115(g), IT IS ORDERED that the application for review IS DENIED.[2]

4. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, shall send by Certified Mail - Return Receipt Requested, a copy of the Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] We reject the applicant's apparent suggestion that our recently released *Notice of Inquiry In the Matter of Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, 3 FCC Rcd 3664 (1988), warrants the imposition of new standards or procedures for processing FM broadcast translator applications. In that *Notice of Inquiry*, we stated that applications, "against which a petition to deny has been filed in accordance with Section 309(d)(1) of the Communications Act raising issues regarding for-profit operation or unequal competition, will be held pending resolution of that proceeding." *Id.* at 3673. However, in order for an application to be held, petitioners and other parties must assert specific allegations of fact sufficient to show that grant of the application in question would be *prima facie* inconsistent with the public interest. Conclusory allegations based only on supposition do not meet the requisite standard. Price has failed to provide any evidence to support its allegation that Cory intends to operate the subject translator station on a for-profit basis and, therefore, we will not defer consideration of this case pending resolution of the *Notice of Inquiry*.

[2] We note as a procedural matter, however, that because Price had comsummated the assignment prior to filing its petition for reconsideration, it met the statutory requirements for standing at the time it filed its petition for reconsideration, i.e. it was a person aggrieved or adversely affected. *See* 47 U.S.C. § 405. Accordingly, its petition for reconsideration should have been considered on the merits. This error is without prejudice to Price because we determine herein that the substantive allegations raised in its various pleadings do not present a *prima facie* case that grant of the application would be inconsistent with the public interest. *See* 47 U.S.C. § 309(d).

SEPARATE STATEMENT
OF
COMMISSIONER JAMES H. QUELLO

RE: Application of Robert G. Cory for Construction Permit for a New FM Broadcast Translator Station to Serve Redding and Anderson, California.

Based of the facts before me, I support denying the application for review. The Bureau was correct in concluding that Price Broadcasting failed to raise a material and substantial question of fact concerning operating the translator on a nonprofit basis. The allegations standing alone simply do not justify Commission action in this case.

I am concerned, however, because the Commission has not yet attempted to develop criteria or precedent to guide parties in addressing these issues. In its *Notice of Inquiry Concerning Rules for FM Translator Stations,* 3 FCC Rcd 3664, 3673 (1988), the Commission stated it would hold translator applications in abeyance where a petitioner raised a substantial and material question that the translator was not being operated as a nonprofit entity or that it would result in unequal competition. To my knowledge, no petitioner has successfully met either of these tests. The Commission should work towards establishing criteria upon which these cases can be analyzed. *See Astroline Communications Company Limited Partnership v. FCC,* 857 F.2d 1556 (D.C. Cir. 1988).

I would have preferred that the Commission shed some light on this subject in the context of this case. Nevertheless, based of the specific facts of this case, I support the Commission's decision.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

TRI-VALLEY BROADCASTING COMPANY — File Nos. BMPH-861022IC, BMPH-840829AX

For modification of Construction Permit to change transmitter site
Hinsdale, New Hampshire

MEMORANDUM OPINION AND ORDER

Adopted: April 20, 1989; Released: June 8, 1989

By the Commission: Commissioner Quello dissenting.

1. The Commission has under consideration an application for review of the grant of the above-captioned application (File No. BMPH-840829AX) ("August 1984 CP application") for modification of the construction permit of WYRY-FM, Hinsdale, New Hampshire. Also before the Commission is a petition for reconsideration of the grant of the above-captioned application (File No. BMPH-861022IC) ("October 1986 CP application") for further modification of WYRY.

2. *Background* On March 3, 1984, Monadnock Broadcasting Corporation[1] was granted a permit (File No. BPH-820824AC) to construct and operate a new FM facility on channel 285A in Hinsdale, New Hampshire, WYRY-FM ("WYRY"). The transmitter site specified in this permit was fully spaced to WXLO-FM ("WXLO"), Fitchburg, Massachusetts. Subsequently, however, WYRY determined that its proposed site was not suitable because restrictive covenants in the deed prohibited subdivision of the land or commercial use of the property. Accordingly, WYRY filed the August 1984 CP application to relocate its transmitter to a site short-spaced by approximately 11 kilometers to WXLO in violation of 47 C.F.R. § 73.207. WXLO filed an opposition to this application. On May 23, 1985, the Chief, FM Branch, Audio Services Division, Mass Media Bureau, denied WYRY's waiver request and application because the applicant failed to make an adequate threshold showing that no fully spaced or less short-spaced sites were available. In its petition for reconsideration of this decision, WYRY provided documentary evidence to support its claim that no fully spaced or less short-spaced sites were available. WYRY provided further documentary evidence to support its claim that a waiver was in the public interest because WYRY would be the first local broadcast service licensed to Hinsdale and would provide a badly needed emergency communications system to the community in the event of an accident at the nearby Vermont Yankee Nuclear Power Plant. WXLO filed an opposition to this petition for reconsideration arguing that a fully spaced site was available.

3. Relying on the evidence set forth in WYRY's application and petition for reconsideration and the oppositions thereto, the Chief Audio Services Division, Mass Media Bureau ("Chief"), ruled that a waiver of the spacing requirement was justified because WYRY had documented its extensive, yet unsuccessful, efforts to locate a fully spaced site and because the site WXLO alleged was available was prohibitively expensive and the owner had expressed reluctance to having the property used for a transmitter site. The Chief also found that construction of the proposed facility would provide Hinsdale with a first local broadcast service and with emergency communications capabilities it did not presently have. In this regard, the Chief noted the broad support for WYRY's proposal from state and local authorities. Finally, the Chief noted that a channel study conducted in an effort to locate another frequency for WYRY's use had been unsuccessful. Thus, denial of WYRY's modification would result in cancellation of the outstanding construction permit and deletion of the allotment to Hinsdale, thereby depriving the community of its first local service.

4. On April 18, 1986, WXLO filed an application for review of this grant. However, before the Commission acted on this application for review, WYRY filed yet another modification application, the October 1986 CP application, to relocate its transmitter to a site approximately one kilometer away from its previously authorized site, thus reducing the spacing deficiency to WXLO to approximately 10 kilometers. Believing that no objections to this application had been filed, the staff granted the October 1986 CP application on December 31, 1986.[2] WXLO thereafter filed a petition for reconsideration on January 29, 1987, requesting that grant of the October 1986 CP application be set aside until the Commission acted on WXLO's application for review of grant of the August 1984 CP application.

5. *The application for review.* WXLO asserts that the Bureau improperly concluded that a waiver was warranted in this case because: (i) fully spaced and/or less short-spaced sites are available to WYRY; (ii) WXLO would receive destructive interference if WYRY were to operate at the proposed site; and (iii) Hinsdale is served by at least four radio stations which provide the community with primary or better service and therefore could alert Hinsdale residents in the event of a nuclear accident at the nearby Vermont Yankee Nuclear Power Plant. In response, WYRY asserts that WXLO improperly raises new facts which the Bureau has had no opportunity to consider and, thus, WXLO's allegations are untimely and should not be considered, citing 47 C.F.R. § 1.115(c) and 47 U.S.C. § 155(c)(5).[3] WYRY also claims that the site alternatives specified by WXLO are not acceptable, that no destructive electrical interference to WXLO will result and that the public interest requires a first local broadcast service in Hinsdale.

6. The arguments advanced in WXLO's application for review rely entirely on new facts upon which the Bureau has had no opportunity to pass. 47 U.S.C. § 155(c)(5) provides that an application for review may not "rely on questions of fact or law upon which . . . [the designated authority] has been afforded no opportunity to pass." *See also* 47 C.F.R. § 1.115(c). Since the affidavits and engineering exhibits upon which WXLO relies were never presented to the Bureau, these affidavits and exhibits and the arguments based thereupon are procedurally defective. Notwithstanding this procedural deficiency, we believe

that the public interest would be best served by consideration, on our own motion, of the matters raised in the application for review and the related pleadings given the magnitude of the spacing deficiency involved here and the seriousness of the alleged deficiencies in WYRY's waiver request. *See Garrett, Andrews and Letizia*, 50 RR2d 802 (1982).

7. WXLO has submitted the affidavits of two Vermont landowners (Reed and Houghton) expressing their willingness to negotiate the sale or lease of their property for use as a transmitter site. These sites would be fully spaced to WXLO. WXLO has also submitted the affidavit of its chief engineer, Eugene Faltus, attesting to the existence of a third less short-spaced site in Vermont (George site) for which the owner was willing to discuss a lease arrangement for WYRY's antenna on an existing tower. In response, WYRY asserts that the willingness of property owners to negotiate the sale or lease of their land does not establish that these sites are in fact suitable. Indeed, the president of WYRY, Richard DeFabio, contacted the owners of the sites specified in WXLO's application for review and determined that these sites were either not available or were unsuitable for WYRY's needs. Specifically, with respect to the two fully spaced sites, the Reed and Houghton sites, WYRY states: (i) that both sites are located in residential neighborhoods; (ii) that the neighbors of these two sites are strongly opposed to the construction of a broadcast tower;[4] (iii) that the Reed site (which also accommodates the Reed home) is less than one acre and is thus too small to accommodate WYRY's tower; and (iv) that Houghton has since indicated that she would not sell or lease her land for WYRY's construction project. *See* Opposition to application for review at pp. 6-7 and Exhibit 1 thereto; *See also* Supplement to opposition to application for review, Exhibits D and E (affidavits of Houghton and Reed's neighbor, Ernest Martel). The third site, the George site, referenced by WXLO already has a tower structure located on the property but the owner had doubts as to whether this structure could support WYRY's antenna. Moreover, assuming the existing structure could support the antenna, WYRY would be restricted (due to the size of the tower) to 50% of maximum class A facilities. If the existing tower could not support WYRY's antenna, the owner could not assure that it could get the necessary permission to construct another tower at the site. Thus, WYRY concluded that the George site was also unsuitable.

8. In considering the alternate sites suggested by WXLO, we must also evaluate the suitability of these sites for the purpose intended. *See WSET, Incorporated*, 80 FCC 2d 233, 242 (1980). We believe that WYRY has demonstrated either the unavailability or unsuitability of each of these sites. We therefore reject WXLO's claim that fully spaced or less short-spaced sites are available.

9. WXLO next contends that it will receive destructive interference if WYRY is permitted to locate its transmitting facilities at a site short-spaced to WXLO. In support of this claim, WXLO submits an Engineering Statement prepared by W. Jeffrey Reynolds which purportedly demonstrates that there would be predicted overlap of the WXLO protected and WYRY interfering contours. In opposition, WYRY submits its own Engineering Statement which purportedly demonstrates that there would be no predicted overlap of the protected and interfering contours. In determining whether a waiver of the distance separation requirements is justified, the Commission has consistently focused on the threshold question of whether there are any suitable fully spaced or less short-spaced sites available and, if not, whether the public interest benefits are sufficiently compelling to offset the magnitude of the spacing deficiency proposed. *See Townsend Broadcasting Corp.*, 62 FCC 2d 511 (1976); *Megamedia*, 67 FCC 2d 1527 (1978). The Commission has also consistently refused to waive the distance separation requirement simply on the basis of an applicant's claim that no objectionable interference will result because there is no predicted overlap of the protected and interfering contours of the affected stations. *Florissant Broadcasting Co., Inc.*, 40 RR 2d 428 (1977). Use of protected and interfering contours as an assignment tool for commercial FM broadcast stations was specifically rejected in 1962 when the Commission adopted the minimum distance separation requirements because distance separations offered a more simplified analysis of potential interference and ensured that stations initially operating at less than full facilities for their class would have the opportunity to increase to maximum facilities in the future. Specifically, the Commission reasoned that the "protected contour concept" would cause delays and burdens to the Commission, private parties and, ultimately, the public and would not afford the "go-no-go" certainty and flexibility inherent in a table of allotment/minimum distance separation scheme. *See Revision of FM Broadcast Rules*, 33 FCC 309, 321 (1962). Nevertheless, in those instances where an applicant seeking waiver of the distance separation requirement has made the necessary threshold showing that no suitable fully spaced or less short-spaced sites are available, we believe that predictions of the protected and interfering contours of the affected stations do provide some measure of the extent of objectionable interference potentially involved and, thus, are useful in making our determination as to whether the public interest benefits are sufficiently compelling to offset the magnitude of the potential interference. In the instant case, the area predicted to receive interference by WXLO's own calculations is minimal, representing less than .3% of the area within WXLO's protected contour. Furthermore, the terrain is so mountainous that it is not likely that the affected area receives a satisfactory signal from WXLO notwithstanding the location of WYRY's transmitter. Thus we do not believe that the magnitude of the potential interference involved here outweighs the distinct public benefits resulting from WYRY's operation. Nevertheless, if WYRY receives any complaints of actual interference within the area of predicted overlap, WYRY will be responsible for resolving those complaints.

10. Finally, we turn to WXLO's claim that Hinsdale lies within the predicted service contour (60 dbu) of four FM stations and that these stations could therefore provide the necessary warning to the community in the event of a nuclear accident. In support of this claim, WXLO submits a second engineering statement prepared by W. Jeffrey Reynolds. While we do not wish to express any opinion as to the accuracy or reliability of these signal coverage calculations, we note that by WXLO's own admission, the signal coverage of these four stations is adequate when calculated "assuming uniform terrain heights in all directions." Application for review, Attachment 5 at p.2. This assumption, however, is clearly at odds with the record in this proceeding which demonstrates that Hinsdale is situated in rugged, mountainous terrain. Moreover, we believe that the inadequacy of the present warning/notification system is patently obvious in the con-

cerns expressed by state and local officials, prompting their support for the WYRY facility. *See e.g.*, Supplement to opposition to application for review, Exhibit B.

11. In sum, we believe that a waiver of the distance separation requirements is justified in this case. WYRY has demonstrated that no fully spaced or less short-spaced sites are either available or suitable for its transmitting facilities. Although WXLO will receive less protection than that contemplated by our rules, we believe that the strong public interest considerations involved here outweigh the minimal predicted interference which may result from WYRY's operation. WYRY represents the only local broadcast service to Hinsdale, a community located in close proximity to the Vermont Yankee Nuclear Power Plant which does not receive adequate service from other broadcast stations in the area due to the nature of the terrain. As was previously noted in a letter from the Chief, Audio Services Division, dated March 19, 1986, granting a waiver for the short-spaced site, a channel study was conducted by the staff and it determined that no alternate channels which allow full spacing are available. Therefore, if denied a waiver, WYRY's construction permit would be cancelled, it would be forced to cease operations, and the Hinsdale channel would be deleted from the Table of Allotments, thereby depriving Hinsdale of its first local service. Under such circumstances, we believe that the public interest is best served by grant of the waiver. Accordingly, IT IS ORDERED, that the application for review filed by WXLO IS DENIED. In view of our action herein, IT IS FURTHER ORDERED that the petition for reconsideration filed by WXLO IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] On August 1, 1986, the Commission approved the pro forma assignment of WYRY from Monadnock Broadcasting Corporation to Tri-Valley Broadcasting Company.

[2] In fact, On November 17, 1986, WXLO filed a letter objection to WYRY's October 1986 CP application. However, this objection did not come to the staff's attention until the staff's grant of the October 1986 CP application became final.

[3] These sections of the rules and the Communications Act generally provide that applications for review shall not rely on questions of fact or law on which the authority below has had no opportunity to pass.

[4] Title 10, Chapter 151, State Land Use and Development Plans, Vermont Statutes Annotated, provides adjoining property owners the right to request a hearing on the intended use of a parcel of land for commercial or industrial purposes.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WILLIAM D. EGLINTON FOIA Control No. 89-2

On Request for Inspection
of Records

MEMORANDUM OPINION AND ORDER

Adopted: May 24, 1989; Released: June 8, 1989

By the Commission:

1. Before the Commission is an Application for Review filed by Stanford Dubin (Dubin), Esquire, of the Seafarers International Union, on behalf of William D. Eglinton, Director of Vocational Education for the Seafarers Harry Lundeberg School of Seamanship, seeking review of a decision entered by the Chief, Field Operations Bureau (Bureau) on January 11, 1989. That ruling denied Eglinton's request for inspection of records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

2. The requester sought copies of "the bank of test questions for the General Radio Telephone Operator License, the Marine Radio Operator Permit, and the Ship Radar Endorsement."[1] The Bureau denied his request based on section 0.457(b)(3) of the Commission's rules, 47 C.F.R. § 0.457(b)(3), which specifically exempts from mandatory disclosure "[a]ll materials used in conducting radio operator examinations, including test booklets, Morse Code tapes, and scoring masks," and 5 U.S.C. § 552(b)(2), which protects material relating solely to the Commission's internal practices.[2] In his initial request, Eglinton failed to allege facts or arguments in support of disclosure of this material as required under section 0.461 of the Commission's rules, 47 C.F.R. § 0.461, and the Bureau denied his request accordingly.[3]

3. On appeal, Dubin asks the Commission to reverse the Bureau's decision below denying access to the requested information. According to the requester, "the Coast [Guard] has responded favorably to a similar request and they now provide access to a bank of test questions for various Coast Guard ratings," thus establishing precedent for allowing access to this type of information.[4] In addition, the requester disputes the Bureau's finding that release of this information would destroy the utility of the examinations and lead to the licensing of unqualified applicants."[5] In the requester's view, "[u]nless the exact same questions are used every time the test is administered the release of past questions can only result in better prepared applicants" since "such information would provide applicants with a clear understanding of the type of questions they may expect on the exam."[6] The requester also asserts that applicants cannot adequately prepare for the FCC examinations at issue because "there are no published texts that provide a sampling of questions based on new technology" and "the FCC's own Information Bulletins are general in nature."[7]

4. Upon review, we agree with the decision reached by the Field Operation's Bureau that this material is exempt from disclosure in its entirety. We are unpersuaded by the requester's argument that the Coast Guard case serves as precedent in this matter. Unlike the Coast Guard situation, where access was given "to a bank of test questions for the various Coast Guard ratings," the Commission does not maintain a bank of questions for these examinations.[8] During the past five years, the Commission has simply reused the same examinations.[9] Indeed, the requester himself recognizes that "if the exact same questions were used every time" by the Commission (which is precisely the case when the same test is given again), then permitting access to this information would impair the validity of these tests.[10] Thus, we agree with the Bureau's finding that it would greatly undermine our ability to license qualified applicants if these FCC examinations were released to the public.[11]

5. In addition, we disagree with the requester's assertion that applicants cannot adequately prepare for these examinations because FCC Information Bulletins are too general. FCC Information Bulletins on the General Radiotelephone Operator License and the Marine Radio Operator Permit outline the subject areas to be tested, as well as provide numerous sample questions.[12] Thus, having established that the requested testing material is exempt from mandatory disclosure pursuant to section 0.457(b)(3) of the Commission's rules and Exemption 2, and finding no considerations which outweigh the facts and reasons favoring nondisclosure as required under section 0.461(f)(4), we find no reason to disturb the Bureau's decision below.

6. Accordingly, IT IS ORDERED, That the Application for Review filed by Stanford Dubin IS DENIED.

7. The requester may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

The officials responsible for this action are the following Commissioners: Patrick R. Dennis, Chairman, James H. Quello and Patricia Diaz Dennis.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Initial Request Letter* at 1. Even though the Commission does not maintain a "bank" of test questions for these examinations, this request was construed to encompass copies of all examinations for the General Radiotelephone Operator License, the Marine Radio Operator Permit and the Ship Radar Endorsement from the past five years.

[2] *Bureau's Letter Decision* at 1. The Bureau explained that the public disclosure provisions of the FOIA, 5 U.S.C. § 552(A), are not applicable to materials that relate solely to the Commission's internal practices, such as the examinations for FCC operator licenses, under FOIA Exemption 2. Emphasizing the Commission's responsibility for issuing operator licenses to qualified individuals under section 303(1)(l) of the Communications Act, 47 U.S.C. § 303(1)(l), the Bureau concluded that

"[d]isclosure of the examination questions other than in a testing situation would destroy the utility of those examinations and would lead to the licensing of unqualified applicants." *Id.*

[3] *Id.*

[4] *Application for Review* at 1.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 2.

[8] *Id.* at 1.

[9] Since the Bureau has indicated that none of the test questions contained in these examinations is obsolete, we need not release any individual questions to the requester. *See In the Matter of Neil D. Friedman*, 62 FCC2d 688, 689 (1976)(obsolete questions from amateur radio license examinations no longer in use and not likely to be used in future were released).

[10] *Application for Review* at 1.

[11] *See In the Matter of Donald H. Bowen*, 60 FCC2d 528, 529 (1976)(amateur radio operator license examination questions and answers currently in use withheld on the basis that release of such information would impair the utility of those examinations and would lead to the licensing of unqualified applicants); *In the Matter of Neil D. Friedman*, 62 FCC2d 688, 690 (1976)(the need to compare old amateur radio operator license examinations to study guides or to use as study material does not outweigh the Commission's interest in serving the public interest by preserving the integrity of its examinations); *see also Patton v. FBI*, 626 F. Supp. 445, 447 (M.D. Pa. 1985), *aff'd mem.*, 782 F.2d 1030 (3d Cir. 1986)(employee testing materials withheld under Privacy Act Exemption (k)(6) and FOIA Exemption 2 on the basis that release of such material "would give future applicants an unfair advantage and would impair the usefulness and value of the system").

[12] *See FCC Information Bulletin No. F0-32*, issued May, 1987; *FCC Information Bulletin No. F0-33*, issued January, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the Commission's *Ex Parte* Rules and Related Rules of Practice and Procedure

ORDER

Adopted: May 26, 1989; Released: June 9, 1989

By the Commission:

1. In this order, the Commission adopts minor changes and clarifications to its *ex parte* rules, 47 C.F.R. §§1.1200-1.1216, and certain other related rules of practice and procedure. These amendments are discussed below and set forth in the Appendix.

2. In order to expedite the processing of *ex parte* filings and other documents in non-restricted proceedings, the Commission is amending sections 1.419(b) and 1.1206(a) to require that all written *ex parte* presentations, memoranda summarizing oral *ex parte* presentations, and informal comments be filed with the Commission *in duplicate*. Additionally, section 1.1206(a) is being amended to require that all written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, as well as any accompanying transmittal letters, be clearly labeled or captioned as *"ex parte"* filings. Further, a note to section 1.1206(a)(4) is being added to make interested persons aware that some *ex parte* filings in non-restricted proceedings, for example, those not filed in accordance with the requirements of section 1.1206(a) set forth above, might not be placed on the weekly public notices of *ex parte* filings prepared by the Secretary. The note also informs interested persons that all *ex parte* filings filed pursuant to section 1.1206(a) will nevertheless be available for public inspection in the public file or record of the proceeding, and that parties wishing to ensure awareness of all filings should review the public file or record.

3. We are also amending sections 1.419 and 1.1202(b) of our rules to clarify the *ex parte* treatment of informal comments in Rule Making proceedings. Informal comments, as well as other pleadings, filed in non-restricted Rule Making proceedings after the close of the reply comment period or the reconsideration reply comment period will be treated as *ex parte* presentations if they address the merits or outcome of the proceeding and are not served on the parties.[1] However, informal comments (including letters to Commissioners or Commission staff) filed in non-restricted Rule Making proceedings prior to the close of the reply comment period, or, if the matter is on reconsideration, the close of the reconsideration reply comment period, will continue not to be treated as *ex parte* presentations.

4. Finally, the Commission is also making the following changes: (a) amending sections 1.51 and 1.419 regarding the number of copies to be filed in Rule Making proceedings and the internal distribution of these copies; (b) clarifying the language of section 1.1203(b) to make clear that responses to *ex parte* presentations made at the request of the Commission or Commission staff during the Sunshine Period must be disclosed pursuant to section 1.1204(b)(7); (c) clarifying the language of section 1.1204(b)(5) so that it tracks the analogous language contained in section 1.1203(c) relating to presentations from other federal agencies; (d) clarifying the language of the note following section 1.1206(a)(3) relating to presentations from Congress or federal agencies; and (e) adding an additional note following section 1.1206(a)(3) to require that separate copies of *ex parte* filings be provided if the filing relates to more than one proceeding.

5. Because the amendments adopted herein are matters of agency practice and procedure, notice and comment is not required. 5 U.S.C. § 553(b)(A).

6. The rule changes adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified requirements or burdens on the public and, accordingly, their implementation is subject to approval by the Office of Management and Budget under that Act.

7. Accordingly, IT IS ORDERED that the Rules and Regulations of the Federal Communications Commission ARE AMENDED in the manner indicated in the Appendix to this order.

8. IT IS FURTHER ORDERED that these amendments to the Commission's Rules SHALL BECOME EFFECTIVE 30 days after publication in the Federal Register, subject to approval by the Office of Management and Budget.

9. Authority for this action is contained in sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 1 (Practice and Procedure) of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 1 continues to read:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. Section 1.51 is amended by revising paragraph (b) to read as follows:

Section 1.51 Number of copies of pleadings, briefs and other papers.

* * * * *

(b) In Rule Making proceedings which have not been designated for hearing, see Section 1.419 of this Chapter.

* * * * *

3. Section 1.419 is amended by revising paragraph (b) to read as follows:

Section 1.419 Form of comments and replies; number of copies.

* * * * *

(b) An original and 4 copies of all comments, briefs and other documents filed in a Rule Making proceeding shall be furnished the Commission. The distribution of such copies shall be as follows:

Secretary (original and 1)	**2**
Bureau	**2**
Information office	**1**
Total	**5**

Participants filing the required 5 copies who also wish each Commissioner to have a personal copy of the comments may file an additional 5 copies. The distribution of such copies shall be as follows:

Commissioners	**5**
Secretary	**2**
Bureau	**2**
Information office	**1**
Total	**10**

However, members of the general public who wish to express their interest by participating informally in a Rule Making proceeding may do so by submitting an original and one copy of their comments, without regard to form, provided only that the Docket Number is specified in the heading. Informal comments filed after close of the reply comment period, or, if on reconsideration, the reconsideration reply comment period, should be labeled "ex parte" pursuant to section 1.1206(a) of this Chapter. Letters submitted to Commissioners or Commission staff will be treated in the same way as informal comments, as set forth above. Also such informal participants who wish the responsible members of the staff and the Commissioners to have personal copies may file an additional 7 copies. The distribution of such copies shall be as follows:

Commissioners	**5**
Secretary	**2**
Bureau	**2**
Total	**9**

* * * * *

4. Section 1.1202(b) is amended by revising the last paragraph as follows:

Section 1.1202 Definitions

* * * * *

(b) * * *

(1) * * *

(2) * * *

Comments and reply comments (including informal comments) filed prior to the expiration of the reply comment period, or, if the matter is on reconsideration, the reconsideration reply comment period, in informal rule making proceedings pursuant to §§1.415 and 1.419, but not in channel allotment rule making proceedings pursuant to § 1.420, are not considered ex parte presentations even if they are not served on other parties.

* * * * *

5. Section 1.1203(b) is amended by adding a new second sentence, "The disclosure requirement set forth in Section 1.1204(b)(7) Note will apply.", immediately following the word "agreements."

6. Section 1.1204(b)(5) is amended by removing the words "staff of" following the phrase "to or from", adding the words "or branch" following the phrase "an agency" in both places that it appears and adding the phrase "or its staff" following the word Government.

7. Section 1.1206 is amended by revising paragraphs (a)(1), (a)(2), and the Note immediately following (a)(3), adding a new Note below the Note immediately following (a)(3) and by adding two new Notes immediately following (a)(4) to read as follows:

Section 1.1206 Non - restricted proceedings; ex parte presentations generally permissible but subject to disclosure.

(a) * * *

(1) *Written ex parte presentations made by persons outside the Commission.* Any person who makes or submits a written ex parte presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation

(as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an ex parte presentation.

(2) *Oral ex parte presentations made by persons outside the Commission.* Any person who in making an oral ex parte presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an ex parte presentation.

(3) * * *

NOTE 1: Unless otherwise exempted under Section 1.1204, presentations from members of Congress or their staff or from other agencies or branches of the Federal Government or their staff that are of substantial significance and clearly intended to affect the ultimate decision shall be treated as ex parte presentations and placed (if oral, a written summary of the presentation shall be prepared and placed) in the record of the proceeding by Commission staff or in accordance with the procedures set forth in Section 1.1206(a)(1)-(3).

NOTE 2: Where a written ex parte presentation (or memorandum summarizing an oral ex parte presentation) relates to more than one proceeding, two copies (or an original and one copy) shall be filed for each separate proceeding.

(4) * * *

NOTE 1: Interested persons should be aware that some ex parte filings, for example, those not filed in accordance with the requirements of this subsection, might not be placed on the referenced public notice. All ex parte presentations and memoranda filed under this section will be available for public inspection in the public file or record of the proceeding, and parties wishing to ensure awareness of all filings should review the public file or record.

NOTE 2: As a matter of convenience, the Secretary may also list on the referenced public notices materials, even if not ex parte presentations, that are filed after the close of the reply comment period or, if the matter is on reconsideration, the reconsideration reply comment period.

* * * * *

FOOTNOTE

[1] We are also adding a second new note to section 1.1206(a)(4) reflecting the fact that the Secretary, as a matter of convenience, may also include post-reply comment period filings, even if not *ex parte*, on the weekly public notices listing *ex parte* presentations in non-restricted proceedings. These notices will be captioned in a manner reflecting that they include both *ex parte* and post-reply comment period filings.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-139

In the Matter of

Reorganization and Deregulation
of Part 97 of the Rules Governing
the Amateur Radio Services.

REPORT AND ORDER

Adopted: May 31, 1989; Released: June 9, 1989

By the Commission:

I. INTRODUCTION

1. On March 24, 1988, we adopted a Notice of Proposed Rule Making (Notice)[1] in the above-captioned proceeding. In the Notice, we proposed to reorganize our Rules for the Amateur Radio Services, 47 C.F.R. Part 97, into a more useful form.[2] We requested interested persons to recommend additional consolidations, clarifications and reductions in regulatory burdens. We also asked for the comments of publishers and distributors of commercially-printed publications containing Part 97.

2. We indicated that we desire to encourage the experimental nature of the amateur service. We stated that we want to enable amateur operators in the United States to create and pioneer communications systems, limited only by their personal interests, imagination and technical skills. The highlight of our proposal was a new system for designating emission types. This system consolidated some 1300 designators under nine terms already familiar to most amateur operators. This simplified system also offered amateur operators the ability to experiment with practically every conceivable kind of emission. We believed this regulatory approach would provide the degree of flexibility amateur operators need in order to achieve the objectives of the service.

3. Our proposed Part 97 reorganization also included the clarification of certain rules and the codification of certain existing policies that have grown in importance as modern amateur communication practices have evolved. In response to the Notice, we received one hundred seventy-three comments and reply comments from individuals and organizations. The comments were highly supportive of our objectives and recommended additional improvements. The few comments we received in opposition generally objected to one or more specific provisions in the proposed rules or in the current rules. This Report and Order adopts the reorganization of the Amateur Radio Services Rules as proposed in the Notice with the changes discussed below.

II. BACKGROUND

4. The amateur service exists for the purpose of self-training, intercommunication and technical investigations carried out by duly authorized persons interested in radio technique solely with a personal aim and without pecuniary interest.[3] The basis for our regulations governing the amateur service is found in treaties, international agreements and statutes that provide for the allocation of frequencies and that place conditions on how the frequencies are to be used in the service.

5. Article 32 of the Radio Regulations, for instance, establishes certain parameters for the amateur service. The Radio Regulations, among other things, limit the types of international communications amateur stations may transmit,[4] require that transmitter power be limited,[5] and mandate that the technical qualifications of amateur operators be verified.[6] The Radio Regulations also provide for certain amateur service bands to be used for facilitating worldwide relief actions in the event of a natural disaster where normal communications systems are overloaded, damaged or completely disrupted.[7] Our statutory authority to adopt operational and technical rules for the amateur service, authorize frequencies, and license amateur operators and stations is contained in the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* (Act). The Act also allows us to accept and employ volunteers to prepare and administer examinations for amateur operator licenses.[8]

6. Part 97 last underwent a major restructuring in 1951[9], at a time when most communication systems in the amateur service utilized high frequency, hand-keyed telegraphy and amplitude modulated telephony. Much of the apparatus in an amateur station was home-built, and there was great reliance upon the station control operator to manually perform numerous operating functions. Over the years, as new technologies became popular in the amateur service, rule additions and amendments were adopted to accommodate them. The result is a patchwork of rules that can be confusing, particularly to prospective licensees. This proceeding was intended to correct this situation.

III. DISCUSSION

7. In the Notice, we stated that we believe a reorganization and clarification of Part 97 would help create a regulatory environment that would encourage modern techniques, technology and uses of amateur radio. We proposed to eliminate unnecessary rules and to simplify complex terminology. We stated that the proposed rules were intended to provide the framework and flexibility necessary to permit amateur operators to continue to utilize their unique ability to advance the radio art.

8. A majority of the commenters agreed that the reorganization and revision of Part 97 is necessary and timely.[10] They also recommended further improvements, some of which were extremely broad in scope and varied widely concerning specific details. Commenters opposing the reorganization were generally concerned that it would increase regulation of the amateur service.[11] Most commenters opposed the proposed new rule concerning restricted operation.[12] Numerous commenters also sought to address issues that were not specifically raised in the Notice. Some argued for reconsideration of past proceedings concerning such matters as transmitter power measurement, repeater coordination, and operator license

requirements and privileges.[13] Other commenters wanted to raise new regulatory issues such as increasing performance standards for volunteer examiners (VEs) and volunteer-examiner coordinators (VECs), prohibiting the use of an amateur station to bypass public telephone system toll charges, adding rules for stations engaged in direction-finding practice, and increasing membership requirements for club station license renewals.[14] Still other commenters desired to debate requirements set forth in the Act and the Radio Regulations.[15]

9. In view of the strong support expressed in the comments, we have reorganized Part 97, substantially as proposed. As a result of recommendations from commenters, however, many modifications have been incorporated in the final rules. We have also deleted unnecessary rules. We believe this revision will provide a more meaningful, easy-to-use body of regulations. The simplified emission designator system, for example, utilizes familiar terminology while allowing greater flexibility in the types of emissions that may be transmitted by amateur stations. Substantive matters previously decided in other proceedings, and significant regulatory proposals that were advanced in the comments for the first time went beyond clarifying or reducing the regulatory burden. We decline to address those matters in this proceeding.

A. ***Format.***

10. *Proposal.* We proposed to restructure Part 97 into a format consisting of six subparts: General Provisions, Fundamental Purposes of the Amateur Service, Station Operation Standards, Special Operations, Technical Standards, and Qualifying Examination Systems. Additionally, we proposed to include four appendices containing supplemental information helpful in understanding the rules.

11. *Comments.* Most comments did not specifically address this matter. The ARRL, however, stated that it found the proposed format useful but recommended changing the title of Subpart B from "Fundamental Purposes of the Amateur Service" to "Serving the Public".[16] Further, ARRL stated that the renamed subpart should be limited to those rule sections proposed under that same division heading in the Notice, and that the rules in the remaining four divisions of the proposed subpart should be relocated to other subparts.

12. *Discussion.* The format changes suggested by the ARRL will make the rules easier to use. We are revising, therefore, the format as suggested by ARRL. There is a wide variation among amateur operators in their understanding of the rules. By providing more precise headings and by further consolidating related rules, we believe that these final rules will be more easily understood by present and future amateur operators.

13. The rules in the proposed Subpart B under the division headings "Advancing the radio art" and "Advancing skills," therefore, have been consolidated with those in Section D, "Technical Standards." The rules under the division heading "Training operators" have been consolidated with those in Section F, "Qualifying Examination Systems." The rule under the division heading "Enhancing international goodwill" has been consolidated with the rules in Subpart C, "Station operation standards." Proposed rule Section 97.107 regarding an amateur station providing communications for public gatherings has been consolidated with those in new Section 97.113(a) as an exception to the prohibition on business communications. The rules that would remain under ARRL's subpart entitled "Serving the Public," however, only pertain to an amateur station engaged in providing emergency communications. For this reason, we have consolidated these rules with the RACES rules in Subpart E, "Providing emergency communications."

B. ***Basis and purpose of the rules.***

14. *Proposal.* In 1951, the Commission established a basis and purpose of the rules for the amateur service in the United States. This basis and purpose is codified in Section 97.1 of the Commission's Rules, 47 C.F.R. § 97.1. It states that the rules in Part 97 are designed to provide an amateur service having a fundamental purpose as expressed in five principles. We proposed no change to Section 97.1.

15. *Comments.* Victor Misek and Betty Marstow[17] recommended the addition of a sixth principle of purpose: "Provide a medium for the free exchange of information and discussion in all areas of human knowledge." G. M. Howard recommended revising the first principle of purpose to include the phrase "inherently stimulates individuals toward education, seeking knowledge, especially in science and engineering."[18] William Gardner wanted "basic and applied electronic education" to be added.[19] David Castle recommended that the rules state that amateur stations have the right "to use the bands to discuss and understand our present day world and to cope with it."[20] The ARRL, however, stated that the basis and purpose contained in Section 97.1 should remain unchanged. The ARRL believes that it is as applicable to the amateur service now as when it was first adopted.[21]

16. *Discussion.* We concur with ARRL that the basis and purpose of the amateur service should not be changed. The suggested changes, in general, are already encompassed in the principle which recognizes that the amateur service is a voluntary, noncommercial communication service. No area of knowledge is now prohibited under the present principles of basis and purpose. No purpose would be served, therefore, by revising the principles that have stood for nearly four decades as the general statement of objectives for the amateur service in the United States.

C. ***Quiet hours.***

17. In the Notice, we proposed to recodify the "quiet hours" rule as Section 97.221 entitled "Restricted operation", to remove certain specific time periods for the imposition of restrictions against amateur station transmissions interfering with stations in other services. Virtually all comments filed by amateur operators expressed strong opposition to our proposal which stated that the Commission may restrict operations as necessary to prevent harmful interference. In particular, the ARRL contended that the proposed rule was unacceptable and violative of the principle of due process of law.[22] While we do not consider these concerns to be valid, in light of the the amateur community's nearly universal opposition to our proposal, we have decided, upon reevaluation, not to adopt it. Although our intent was to clarify and codify the existing rules and policies, we conclude that our proposed language in Section 97.221 has created unwarranted confusion. Accordingly, the text of the rule, now set forth in Section 97.121, remains unchanged from the existing text of Section 97.131. In addition to the existing "quiet hours" provision, the rule generally allows the Commis-

sion, after investigation, to take such steps as may be necessary to minimize interference to stations in other services.[23]

D. ***Scope of amateur service communications.***

18. *Proposal.* In the Notice, we proposed to codify a number of existing policies related to the scope of amateur service communications. Our basic premise that the amateur service has its own objectives and is not intended to be used as an alternative to other radio services was incorporated into the rules.[24] We also proposed to include, as an exception to the general prohibition against amateur stations transmitting business communications, the authority for an amateur station to provide communications at a public gathering. The proposed rule, however, limited this exception by specifically prohibiting an amateur station from being used for logistical support of any sponsoring organization. Further, we proposed to codify our so-called "swap nets" exception, *i.e.*, that communications to inform other amateur operators of the availability of apparatus normally used in an amateur station are not considered business communications. In addition, we proposed to incorporate our policy that allows an amateur station to convey news information for broadcasting purposes in certain limited circumstances.

19. *Comments.* A number of commenters found these proposals restrictive[25] while others considered them so lax[26] as to invite exploitation of the service. In this regard, the ARRL stated:

> The Amateur Radio Service requires, on the one hand, flexibility in the regulations, in order to permit the widest range of experimentation and public service and emergency communications. On the other hand, the Service is unique in requiring protection from encroachment by commercial entities which would exploit the Service. The non-commercial nature of amateur radio is both unique among the radio services administered by the Commission, and beneficial in terms of the public service functions it performs. The Service is akin to the public parks, requiring protection from exploitation so that the public can both use it and benefit from its use.[27]

20. Several commenters addressed the matter of amateur stations transmitting communications in support of a public gathering. It was generally agreed that the main beneficiary of any such communications must be the public. Some commenters, however, disagreed with the proposal to prohibit the amateur station from providing logistical support for the sponsoring organization. Some sponsors find the cost of two-way communications systems intended for providing logistical communications to be prohibitive. For example, it was estimated that the cost of the necessary communications from a commercial supplier for a parade in New York City would cost more than $2,000.[28]

21. On the matter of swap nets, ARRL stated that communications to inform other amateur operators of the availability for sale or trade of amateur station apparatus should be allowed. It suggested, however, that the rule should also codify our policy[29] that excludes any person from such communications who is seeking to derive a profit by buying or selling such apparatus on a regular basis.[30]

22. The Radio-Television News Directors Association (RTNDA) *et al.*[31] was concerned that our standards regarding broadcast-related activities unnecessarily restrict amateur operators who wish to volunteer to cooperate with professional print and electronic journalists in disseminating information about important news events when no other voice communications are available to the journalists. RTNDA urged that the proposed standards that allow an amateur station to transmit news information be further relaxed. At the minimum, RTNDA requested that the current policy be revised. First, the information should only involve, rather than be critical to, protecting the safety of human life or property. Second, where the event is foreseen, information may still be transmitted when other means of communication could not reasonably be provided.[32]

23. The ARRL countered RTNDA by noting that communications to protect safety of life or property is fundamentally different from communications used to file news reports. The ARRL said that allowing amateur stations to be used for the latter could lead to abuses and include events that have no relationship whatever to emergency or public service communications. The ARRL also stated that the RTNDA proposal is too broad to prevent commercial exploitation of the non-commercial amateur service.[33]

24. Other commenters addressed the prohibition against amateur stations retransmitting the signals and programs of stations in other radio services. Philip Stein suggested that retransmission of Government weather station broadcasts should be specifically addressed in the rules, either permitting or prohibiting them.[34] The ARRL also stated that there has been much confusion about this matter within the amateur community, and it is desirable that it be clarified. The ARRL suggested that amateur stations be authorized to retransmit on the amateur service 6 meter and shorter wavelength bands the weather, propagation, and time bulletins transmitted by Department of Commerce stations. The ARRL stated that the use of these bulletins is of direct interest to the amateur service.[35]

25. *Discussion.* We concur with the ARRL's observation concerning the need for a proper balance in the rules between the flexibility to achieve the objectives of the amateur service and the degree of protection necessary to prevent exploitation of the service. The amateur service should be allowed to utilize its allocated frequencies to pursue its objectives unfettered by encroachment from commercial entities. The amateur service frequencies should not be exploited by those who would use them as an alternative to the land mobile, broadcast, maritime, or common carrier radio services, all of which have been established to meet the public's requirements through the regulatory process.[36] We have provided, however, narrow exceptions in specific situations where the facilities of the amateur service can fill a communications void.

26. The most important exception concerns providing emergency communications. Although we authorize frequencies for use during emergencies to public safety agencies, ships, and aircraft, there are types of emergencies where amateur service systems can make a unique contribution to the public welfare. The public is well served by having technically qualified amateur operators with transmitting apparatus available in practically every area of the world. When a disaster strikes such that normal communications systems are overloaded, damaged, or completely disrupted, amateur service systems often can

assist immediately with relief operations.[37] They can temporarily help bridge the gap until normal communications systems are restored. In new Section 97.113, therefore, in view of the comments received, we have clarified the general prohibition against amateur stations transmitting communications as an alternative to other authorized radio services. This clarification applies to stations providing emergency communications as described in new Subpart E.

27. A second exception is for communications that relate to the public's safe observation and participation in a parade, marathon or similar public event. In view of the comments received, we have decided to allow communications that principally benefit the public. While authorizing the use of amateur stations for logistical support of such events, the rules state that the principal beneficiary of such communications must be the public and that any benefit to the sponsor must be incidental. For clarity, we have replaced the term "logistical" with its contextual meaning, *i.e.*, communications that concern moving, supplying and quartering observers or participants. We emphasize, however, that avoiding the cost of obtaining communications in the proper radio service is not a valid basis for using amateur service facilities.

28. With respect to communications relating to the buying and selling of amateur station apparatus, we have included such communications as an exception to the general prohibition against business communications. We appreciate ARRL's suggestion that the rule should explicitly forbid such communications by those seeking to profit from these sales or purchases on a regular basis. We have incorporated, therefore, this proscription in the final rules.

29. Another exception is for communications that assist journalists in filing reports. The recommendation of RTNDA, to broaden the limited circumstances when an amateur station may transmit communications for journalists, does not appear to compromise either the amateur service or the broadcast service.[38] Communications for journalists will be permitted only in extraordinary circumstances. Such transmissions directed to foreign countries, however, are not permitted because of the provisions of the Radio Regulations which limit international communications to unimportant remarks of a personal character, and to communications to facilitate worldwide relief efforts in case of a natural disaster.[39] The transmission of reports for journalists, moreover, must not detract from the efforts of other stations that are actually engaged in providing emergency communications. Because this policy must apply equally to all types of amateur service activities, it is codified in Section 97.101(c) as a general standard for all amateur station operation.

30. Regarding the rebroadcasting of Government weather stations, Section 97.113(c) of the Commission's Rules, 47 C.F.R. § 97.113(c), now clearly prohibits an amateur station from retransmitting programs or signals from any class of radio station other than amateur, except as necessary to providing emergency communications. This rule is continued in new Section 97.113(e). It has been rewritten only to consolidate the existing exception for space shuttle communications. We decline, however, to authorize the retransmission of Government weather stations or other broadcasts on amateur service bands. These broadcasts can be widely received by very affordable receivers. We see no reason to allow the use of the amateur service frequencies for such retransmissions.

E. ***Operator license examinations.***

31. *Proposal.* We proposed to revise the telegraphy examination standards to require that the examinee be responsible for knowing 43 code characters. Under our proposal, an examination message could, but would not necessarily have to, include all of the characters. We also proposed to delete the requirement of current Section 97.26(g) of the Commission's Rules, 47 C.F.R. § 97.26(g), that an examinee whose physical disability requires special procedures in order to participate in an examination session submit a physician's certification to the administering volunteer examiners (VEs) indicating the nature of the disability.

32. *Comments.* Ray Adams (Adams) recommended that the sending segment of a telegraphy examination be eliminated.[40] Also, Adams had previously filed two petitions for rule making[41] concerning the telegraphy examination. Although the petitions were dismissed, the matters they raised, examination standards, were addressed in the Notice. The ARRL stated that a telegraphy examination should be for a minimum of, rather than an exact, five minutes so that VEs can construct messages that will include all of the necessary characters.[42] Gordon West Radio School (Radio School) agreed with our proposal to delete the requirement that every character be included in each message. The Radio School stated that most examination messages are, in fact, approximately 6 to 7 minutes in length and it supports a minimum, rather than a precise, 5 minute duration requirement.[43]

33. The ARRL expressed concern that our Notice did not place any obligation on an examinee to establish that that examinee indeed has the claimed disabilty entitling the examinee to special examination procedures.[44] Adams commented on the proposed rule which limits a volunteer-examiner coordinator (VEC) to serving only in the VEC region requested and authorized. He noted that, under the rules, a VEC could coordinate examination sessions in Europe, but could not coordinate examination sessions in a neighboring state without first obtaining permission from the Commission. He suggested that all VECs be authorized to coordinate examination sessions anywhere in the United States.[45]

34. *Discussion.* The Radio Regulations stipulate that all persons seeking a license to operate an amateur station transmitting below 30 MHz must prove that they are able to send correctly by hand and to receive correctly by ear texts in the Morse code.[46] The requirement for the ability to send, therefore, cannot be eliminated from the rules. We have codified in new Section 97.509, however, the policy that a telegraphy receiving test alone is adequate proof of both sending and receiving abilty.[47] The sending segment, therefore, is an option left to the administering VEs for any particular examination.

35. We concur with Adams's comments concerning the difficulty in preparing a telegraphy message. A knowledge of all the characters, nevertheless, is basic to sending and receiving texts correctly.[48] We have, therefore, included in Section 97.507 a requirement that the telegraphy message must be a minimum of 5 minutes in duration. This will allow the VEs to prepare every test message using each of the required characters at least once and thereby provide more uniform test messages. Additionally, we have specified the number of questions that must be answered correctly for each written element, rather than a percentage of correct answers. Also, the number of questions that must be asked on each topic of each examination element

has been specified. In both cases, by so doing, we have eliminated the uncertainty as to the exact number of questions on a particular examination that must be answered correctly and have obviated any "rounding off" that was necessary when the number of questions to be asked on a particular topic was given in the rules as a percentage.

36. With respect to an examinee's physical disability, the knowledge and skill needed to qualify for an amateur operator license are exactly the same for everyone. VEs must allow an examinee, however, to demonstrate the required knowledge and skill in a way that accommodates a particular physical disability. For example, an examinee with a hearing impairment may be administered the telegraphy examination by flashing light or tactile device instead of by sound.[49] We agree with ARRL's concern, however, that there are instances where an examinee's claimed disability is only an attempt to cheat. A reader or transcriber, for instance, who is not one of the administering VEs could provide unauthorized assistance to the examinee. The administering VEs, therefore, need the authority to require expert verification that the physical disability requires a reader or transcriber who is not one of administering VEs. This option is provided in new Section 97.509(h).

37. The recommendation made by Adams concerning authorization for VECs to coordinate examination sessions anywhere in the United States is well taken. It is inconsistent for a VEC to be authorized to coordinate examination sessions in foreign countries many thousands of miles distant while being prohibited from coordinating a session in a neighboring state because it happens to be in another VEC region. To rectify this anomaly, we have modified the rule so that a VEC is not limited to a designated region in the United States.

F. *Definitions*.

38. *Proposal*. We proposed to eliminate the rule section containing the definitions of terms used in the rules. Instead, we defined each term parenthetically where it first appeared in the rewritten rules and included a glossary of the terms in an appendix.

39. *Comments*. The ARRL stated that this proposal was not useful in applying the rules. Further, it stated that absent a centralized definitional section, in the case of a term that appears in numerous rules, the user will be forced to hunt for the definition.[50] The ARRL also suggested that an exception be included in the definition of the term, "third-party traffic," that would have the effect of removing the international prohibition against transmitting such communications for a third party holding an amateur operator license.[51] The ARRL stated that surveys of member societies of the International Amateur Radio Union have shown that virtually all national telecommunications administrations that have considered the matter do not treat amateur-to-amateur communication as third party traffic.[52]

40. *Discussion*. We concur with the ARRL that a separate listing of terms is helpful to the user. We have retained, therefore, Section 97.3, "Definitions." Our reorganization and consolidation of the rules, however, has reduced the number of times certain terms are used. Where a term appears a single time, we have substituted the definition for its term. The terms "business communications," "antenna structure," "space shuttle communications" and "telegraphy practice," for example, have been replaced with their definitions. Also, in Section 97.3, we have included the definitions for the technical symbols and the emission type indicators used in the rules.

41. We have also simplified several of the terms. The term "amateur station in beacon operation" has been shortened to "beacon." Simplification also resulted in the terms "repeater," "Earth station" and "space station." We have substituted the phrase "within 50 km of the Earth's surface" for "major portion of the Earth's atmosphere," as a more meaningful differentiation between locations of stations in the amateur service and those in the amateur-satellite service. The definition of terms, such as "automatic," have been deleted because the common meaning is sufficient.

42. With respect to ARRL's suggestion that the definition of third party traffic be revised, we note and concur with the following statement on this matter by the Department of Trade and Industry (DTI) of the United Kingdom:

> Third Party Traffic should be regarded under two separate headings:
>
> - the passing of messages on behalf of other licensed radio amateurs; and
>
> - the passing of messages on behalf of non-licensed people or organizations.
>
> The DTI is content to accept that the passing of messages on behalf of other licensed radio amateurs (at home and abroad) does not contravene the prohibition against third party traffic to be found in the International Radio Regulations (see RR 2733).[53]

Rather than include the exception to the prohibition on international third party communications in the definition of third party traffic, however, we have consolidated it in new Section 97.115 with the rule itself. We believe that this action comports with our expressed intention to reduce regulatory burdens.

G. *RACES*.

43. We proposed to consolidate the rules governing RACES together with the rules in the sections containing the specific subject matter. Several commenters felt that the current one hour per week limit on RACES tests and drills is unduly restrictive and suggested it be deleted or changed to state that such tests and drills may be conducted as preparation and practice for emergency operations.[54] The ARRL suggested that the time limit should be subject to waiver twice per year by the chief officer for emergency planning of the state.[55]

44. In 1976, the Commission limited the use of RACES station drills and tests to one hour a week.[56] The comments in that proceeding noted that under the guise of RACES drills and tests, improper use was being made of amateur service frequencies for local government land mobile communications. The intervening years have proven that the drill and test limitation has been effective in curbing that type of misuse of amateur service frequencies. We are persuaded by the comments, however, that there are certain circumstances when a longer RACES drill or test exercise is justified and can be accommodated without inviting misuse of the amateur service frequen-

cies. We are incorporating into the rules, therefore, an exception to the time limitation where an emergency planning official specifically approves the drill or test.

H. ***Station antenna structures.***

45. Although our Notice did not address the matter, the ARRL requested that we codify our declaratory ruling regarding the limited preemption of state and local regulations that govern the height and placement of antenna structures.[57] The ARRL stated that the declaratory ruling had encouraged cooperation and dialogue between the local communities and amateur operators. It argued that the inclusion of the limited preemption in Part 97 is critical to the long-term welfare of the amateur service.[58] In view of ARRL's comments, we conclude that it would be useful to make note of the existence of the declaratory ruling in Part 97. We have, therefore, included a concise summary of its essential points in the rule section that deals with station antenna structures.

I. ***Good amateur practice.***

46. We received a few comments on our proposal to retain the current provisions of Section 97.78, 47 C.F.R. § 97.78, requiring that each amateur station must be operated in accordance with good engineering and good amateur practice. The commenters wanted the rule expanded to include concepts such as comradeship and cooperation.[59] In light of these comments, we have consolidated the good amateur practice requirement with the requirements concerning frequency selection, frequency sharing, and malicious interference in a new rule entitled "General standards." New Section 97.307, moreover, deals with the matter of good amateur practice as applied to signal bandwidth and spurious emissions. We believe these provisions will highlight key practices that an amateur operator should utilize.

J. ***Alien reciprocal operating privileges.***

47. The Notice proposed to codify statutory and policy considerations affecting the issuance of an alien reciprocal operating permit. For example, the proposed rules indicated that a reciprocal permit may not be issued to a representative of a foreign government. Further, the proposed rules provided that a United States citizen, even if also a citizen of another country, is not eligible for an alien reciprocal permit; that an alien must be a citizen of the country with which the United States has the reciprocal arrangement and hold a license from the country of citizenship; and that a reciprocal permit will not be issued to a person holding an FCC-issued amateur operator license. Detailed comments on reciprocal licensing were submitted by Alfred Laun III. Mr. Laun draws a distinction between a license and a permit, and maintains that the provision of the Communications Act which prohibits a representative of a foreign government from holding an amateur station license does not extend to a reciprocal permit.[60]

48. Prior to its amendment in 1974, Section 310(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(a), provided, in pertinent part, that a station license could not be granted (1) to any alien or the representative of any alien, or (2) to any foreign government or the representative thereof. It further provided that, notwithstanding paragraphs (1) and (2), the Commission could issue an authorization to an alien to permit amateur station operation in the United States on a reciprocal basis, if the alien held a license from his or her country. In 1974, Section 310 was amended to allow the licensing of aliens with certain exceptions. In connection with that amendment, the Senate Report that accompanied the bill contains the following language:

> Since 1964 alien amateurs have been permitted under subsection 310(a) to operate their amateur radio stations in this country under reciprocal agreements. . . . The legislation retains the reciprocal authorization now provided for in the penultimate paragaraph of present subsection 310(a).[61]

Mr. Laun's point is well taken. The legislative history of Section 310 is clear that reciprocal permits are not encompassed within the restriction against issuing authorizations to foreign governments or representatives thereof. Moreover, it should be noted that we are merely recognizing a license that has been issued by the alien's own government. The necessary changes have been made to these rule amendments so that a representative of a foreign government is not barred from holding a reciprocal permit.

K. ***Station identification.***

49. The Notice proposed to consolidate the rules relating to station identification. It clearly stated that the purpose of the station identification is to make the source of its transmissions known to those receiving them. In addition, the Notice provided for a self-assigned identifier being included with the station call sign during the identification procedure. A variety of comments suggested changes in the proposed rules, such as clarifying that "communications" means a series of transmissions; specifying a phonetic alphabet; requiring station identification at the beginning of the communication; not requiring the control operator's station call sign if he or she does not exceed the licensee's frequency privileges; and changing data transmission identification.[62] Adams noted that unless the identification procedure allows the use of the word "temporary" to signify the slant mark, the VECs' existing stock of certificates of successful completion of examination forms would be made obsolete.[63]

50. We are clarifying the rules to permit the use of any suitable word denoting the slant mark, such as "stroke" or "temporary." Many of the other suggestions made by the commenters, such as regulating the phonetic alphabet, would militate against the flexibility that is necessary in the amateur service or would reestablish procedures that were eliminated previously. In other instances, the suggestions merely state the commenters' personal preferences. Our focus in the proposed rules concerning station identification was to simplify the procedure. In the furtherance of this objective, we have eliminated suffix identifiers for repeater, auxiliary and beacon stations. Accordingly, we are adopting the rules related to station identification substantially as proposed.

L. ***Repeater station.***

51. Our proposal generally consolidated in one rule section the requirements relating to repeater stations. The ARRL suggested that the requirement for discontinuance of transmissions from a repeater after cessation of transmission by a user station be increased to ten seconds.[64]

Ray Adams suggested the deletion of the restriction that a repeater cannot transmit on more than one channel from the same location.[65] Both of these requirements predated the repeater coordination procedures which are now in effect. We conclude that the repeater coordinator for a given area is competent to establish the necessary arrangements to prevent any repeater-to-repeater interference these provisions were intended to avoid. We have, therefore, deleted these unnecessary rules. We have also deleted the requirement that a repeater may only be remotely controlled where the control link uses a channel other than the repeater receiving channel. While this method can be effective in assuring that the control operator can retain control of the station, there are many localities where the likelihood of the repeater channel becoming blocked is practically nil. New Section 97.105, Control operator duties, moreover, clearly states that the proper operation of the station, regardless of the type of control being used, is the responsibility of the control operator.

M. ***Stations aboard ships or aircraft.***

52. To help promote safe aircraft operation during adverse weather conditions, we proposed to incoporate a requirement that no amateur station aboard any aircraft could be operated while the aircraft was flying under Instrument Flight Rules (IFR), unless the station apparatus had been found to comply with all applicable Federal Aviation Administration (FAA) rules. The Southern California Repeater and Remote Base Association fully supported the proposed rule.[66] One commenter stated, however, that this restriction did not belong in the amateur service rules. [67] We believe, however, it is reasonable to impose the restriction of compliance with FAA rules for amateur station apparatus when the aircraft is flying under IFR. In addition, reference to the applicable FAA rules will put amateur operators on notice that they are responsible for compliance with those rules.

N. ***Appendices.***

53. We proposed to add four new appendices: a list of geographic areas where the amateur service is regulated by the Commission; a list of the VEC regions; a glossary of terms used in Part 97; and a summary of frequency sharing requirements. In addition to adopting ARRL's suggestion to replace the glossary with the section containing definitions, we have included the frequency sharing requirements in Section 97.303. Thus, only two lists remain in the appendices: the geographic areas where the Commission regulates the amateur service, and the VEC regions.

IV. CONCLUSION

54. In summary, we have decided to reorganize and revise Part 97 of the Code of Federal Regulations, 47 C.F.R. Part 97, in order to make the amateur service rules easier to understand and to lay the framework upon which future advancements in communications can be incorporated into the amateur service. In addition, we have deleted unnecessary, obsolete and redundant rule provisions. Accordingly, we are adopting the rules substantially as proposed, subject to the modifications that we have discussed above.

V. REGULATORY FLEXIBILITY ACT

55. Pursuant to Section 605 of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605, the Commission certifies that these rules will not have a significant economic impact on a substantial number of small entities, because these entities may not use the amateur radio services for commercial radiocommunication. Moreover, these rules will not require the use of or significantly enhance the sale of any additional amateur service apparatus.

VI. PAPERWORK REDUCTION ACT

56. The rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.*, and found to decrease the information collection burden that the Commission imposes on the public. This proposed reduction in information collection burden is subject to approval by the Office of Management and Budget as prescribed by the Act.

VII. ORDERING CLAUSES

57. Accordingly, IT IS ORDERED that effective **September 1, 1989,** Part 97 of the Commission's Rules, 47 C.F.R. Part 97, IS AMENDED as set forth below. Authority for this action is found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

58. IT IS FURTHER ORDERED that the petition of G. M. Howard to revise the first principle of purpose in the amateur service rules IS DENIED.

59. IT IS FURTHER ORDERED that a copy of this Report and Order shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

60. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 97 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended, as follows:

1. The authority citation for Part 97 continues to read as follows:

AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609, unless otherwise noted.

2. Part 97 is revised as follows:

PART 97 – AMATEUR RADIO SERVICE

Subpart A - General Provisions

Sec.
97.1 Basis and purpose.
97.3 Definitions.
97.5 Station license required.
97.7 Control operator required.
97.9 Operator license.
97.11 Stations aboard ships or aircraft.
97.13 Restrictions on station location.
97.15 Station antenna structures.
97.17 Application for new license.
97.19 Application for renewed or modified license.
97.21 Mailing address and station location.
97.23 License term.
97.25 FCC modification of station license.
97.27 Replacement license.

Subpart B - Station Operation Standards

97.101 General standards.
97.103 Station licensee responsibilities.
97.105 Control operator duties.
97.107 Alien control operator privileges.
97.109 Station control.
97.111 Authorized transmissions.
97.113 Prohibited transmissions.
97.115 Third-party traffic.
97.117 International communications.
97.119 Station identification.
97.121 Restricted operation.

Subpart C - Special Operations

97.201 Auxiliary station.
97.203 Beacon station.
97.205 Repeater station.
97.207 Space station.
97.209 Earth station.
97.211 Telecommand station.
97.213 Remote control of a station.
97.215 Remote control of model craft.

Subpart D - Technical Standards

97.301 Authorized frequency bands.
97.303 Frequency sharing requirements.
97.305 Authorized emission types.
97.307 Emission standards.
97.309 RTTY and data emission digital codes.
97.311 SS emission types.
97.313 Transmitter power standards.
97.315 Type acceptance of external RF power amplifiers.
97.317 Standards for type acceptance of external RF power amplifiers.

Subpart E - Providing Emergency Communications

97.401 Operation during a disaster.
97.403 Safety of life and protection of property.
97.405 Station in distress.
97.407 Radio amateur civil emergency service.

Subpart F - Qualifying Examination Systems

97.501 Qualifying for an amateur operator license.
97.503 Element standards.
97.505 Element credit.
97.507 Preparing an examination.
97.509 Administering an examination.
97.511 Technician, General, Advanced, and Amateur Extra Class operator license examination.
97.513 Novice Class operator license examination.
97.515 Volunteer examiner requirements.
97.517 Volunteer examiner conduct.
97.519 Coordinating examination sessions.
97.521 VEC qualifications.
97.523 Question pools.
97.525 Accrediting VEs.
97.527 Reimbursement for expenses.

Appendix 1 Places where the amateur service is regulated by the FCC.
Appendix 2 VEC Regions.

Subpart A - General Provisions

§ 97.1 Basis and purpose.

The rules and regulations in this Part are designed to provide an amateur radio service having a fundamental purpose as expressed in the following principles:

(a) Recognition and enhancement of the value of the amateur service to the public as a voluntary noncommercial communication service, particularly with respect to providing emergency communications.

(b) Continuation and extension of the amateur's proven ability to contribute to the advancement of the radio art.

(c) Encouragement and improvement of the amateur service through rules which provide for advancing skills in both the communication and technical phases of the art.

(d) Expansion of the existing reservoir within the amateur radio service of trained operators, technicians, and electronics experts.

(e) Continuation and extension of the amateur's unique ability to enhance international goodwill.

§ 97.3 Definitions.

(a) The definitions of terms used in Part 97 are:

(1) *Amateur operator*. A person holding a written authorization to be the control operator of an amateur station.

(2) *Amateur radio services*. The amateur service, the amateur-satellite service and the radio amateur civil emergency service.

(3) *Amateur - satellite service*. A radiocommunication service using stations on Earth satellites for the same purpose as those of the amateur service.

(4) *Amateur service*. A radiocommunication service for the purpose of self-training, intercommunication and technical investigations carried out by amateurs, that is, duly authorized persons interested in radio technique solely with a personal aim and without pecuniary interest.

(5) *Amateur station*. A station in an amateur radio service consisting of the apparatus necessary for carrying on radiocommunications.

(6) *Automatic control*. The use of devices and procedures for control of a station when it is transmitting so that compliance with the FCC Rules is achieved without the control operator being present at a control point.

(7) *Auxiliary station*. An amateur station transmitting communications point-to-point within a system of cooperating amateur stations.

(8) *Bandwidth*. The width of a frequency band outside of which the mean power of the total emission is attenuated at least 26 dB below the mean power of the total emission, including allowances for transmitter drift or Doppler shift.

(9) *Beacon*. An amateur station transmitting communications for the purposes of observation of propagation and reception or other related experimental activities.

(10) *Broadcasting*. Transmissions intended for reception by the general public, either direct or relayed.

(11) *Control operator*. An amateur operator designated by the licensee of a station to be responsible for the transmissions from that station to assure compliance with the FCC Rules.

(12) *Control point*. The location at which the control operator function is performed.

(13) *CSCE*. Certificate of successful completion of an examination.

(14) *Earth station*. An amateur station located on, or within 50 km of, the Earth's surface intended for communications with space stations or with other Earth stations by means of one or more other objects in space.

(15) *EIC*. Engineer in Charge of an FCC Field Facility.

(16) *External RF power amplifier*. A device capable of increasing power output when used in conjunction with, but not an integral part of, a transmitter.

(17) *External RF power amplifier kit*. A number of electronic parts, which, when assembled, is an external RF power amplifier, even if additional parts are required to complete assembly.

(18) *FAA*. Federal Aviation Administration.

(19) *FCC*. Federal Communications Commission.

(20) *Frequency coordinator*. An entity, recognized in a local or regional area by amateur operators whose stations are eligible to be auxiliary or repeater stations, that recommends transmit/receive channels and associated operating and technical parameters for such stations in order to avoid or minimize potential interference.

(21) *Harmful interference*. Interference which endangers the functioning of a radionavigation service or of other safety services or seriously degrades, obstructs or repeatedly interrupts a radiocommunication service operating in accordance with the Radio Regulations.

(22) *Indicator*. Words, letters or numerals appended to and separated from the call sign during the station identification.

(23) *Information bulletin*. A message directed only to amateur operators consisting solely of subject matter of direct interest to the amateur service.

(24) *International Morse code*. A dot-dash code as defined in International Telegraph and Telephone Consultative Committee (CCITT) Recommendation F.1 (1984), Division B, I. Morse code.

(25) *ITU*. International Telecommunication Union.

(26) *Line A*. Begins at Aberdeen, WA, running by great circle arc to the intersection of 48^0N, 120^0W, thence along parallel 48^0N, to the intersection of 95^0W, thence by great circle arc through the southernmost point of Duluth, MN, thence by great circle arc to 45^0N, 85^0W, thence southward along meridian 85^0W, to its intersection with parallel 41^0N, thence along parallel 41^0N, to its intersection with meridian 82^0W, thence by great circle arc through the southernmost point of Bangor, ME, thence by great circle arc through the southernmost point of Searsport, ME, at which point it terminates.

(27) *Local control*. The use of a control operator who directly manipulates the operating adjustments in the station to achieve compliance with the FCC Rules.

(28) *National Radio Quiet Zone*. The area in Maryland, Virginia and West Virginia Bounded by 39^0 15'N on the north, 78^0 30'W on the east, 37^0 30'N on the south and 80^0 30'W on the west.

(29) *Question pool*. All current examination questions for a designated written examination element.

(30) *Question set*. A series of examination questions on a given examination selected from the question pool.

(31) *Radio Regulations*. The latest ITU *Radio Regulations* to which the United States is a party.

(32) *RACES* (radio amateur civil emergency service). A radio service using amateur stations for civil defense communications during periods of local, regional or national civil emergencies.

(33) *Remote control*. The use of a control operator who indirectly manipulates the operating adjustments in the station through a control link to achieve compliance with the FCC Rules.

(34) *Repeater*. An amateur station that automatically retransmits the signals of other stations.

(35) *Space station.* An amateur station located more than 50 km above the Earth's surface.

(36) *Spurious emission.* An emission, on frequencies outside the necessary bandwidth of a transmission, the level of which may be reduced without affecting the information being transmitted.

(37) *Telecommand station.* An amateur station that transmits communications to initiate, modify or terminate functions of a space station.

(38) *Third party communications.* A message from the control operator (first party) of an amateur station to another amateur station control operator (second party) on behalf of another person (third party).

(39) *VE.* Volunteer examiner.

(40) *VEC.* Volunteer-examiner coordinator.

(b) The definitions of technical symbols used in this Part are:

(1) *EHF* (extremely high frequency). The frequency range 30-300 GHz.

(2) *HF* (high frequency). The frequency range 3-30 MHz.

(3) *Hz.* Hertz.

(4) *m.* Meters

(5) *MF* (medium frequency). The frequency range 300-3000 kHz

(6) *PEP* (peak envelope power). The average power supplied to the antenna transmission line by a transmitter during one RF cycle at the crest of the modulation envelope taken under normal operating conditions.

(7) *RF.* Radio frequency.

(8) *SHF* (super-high frequency). The frequency range 3-30 GHz.

(9) *UHF* (ultra-high frequency). The frequency range 300-3000 MHz.

(10) *VHF* (very-high frequency). The frequency range 30-300 MHz.

(11) *W.* Watts.

(c) The following terms are used in this Part to indicate emission types. Refer to § 2.201 of the FCC Rules, *Emission, modulation and transmission characteristics*, for information on emission type designators.

(1) *CW.* International Morse code telegraphy emissions having designators with A, C, H, J or R as the first symbol; 1 as the second symbol; A or B as the third symbol; and emissions J2A and J2B.

(2) *Data.* Telemetry, telecommand and computer communications emissions having designators with A, C, D, F, G, H, J or R as the first symbol; 1 as the second symbol; D as the third symbol; and emission J2D. Only a digital code of a type specifically authorized in this Part may be transmitted.

(3) *Image.* Facsimile and television emissions having designators with A, C, D, F, G, H, J or R as the first symbol; 1, 2 or 3 as the second symbol; C or F as the third symbol; and emissions having B as the first symbol; 7, 8 or 9 as the second symbol; W as the third symbol.

(4) *MCW.* Tone-modulated international Morse code telegraphy emissions having designators with A, C, D, F, G, H or R as the first symbol; 2 as the second symbol; A or B as the third symbol.

(5) *Phone.* Speech and other sound emissions having designators with A, C, D, F, G, H, J or R as the first symbol; 1, 2 or 3 as the second symbol; E as the third symbol. Also speech emissions having B as the first symbol; 7, 8 or 9 as the second symbol; E as the third symbol. MCW for the purpose of performing the station identification procedure, or for providing telegraphy practice interspersed with speech. Incidental tones for the purpose of selective calling or alerting or to control the level of a demodulated signal may also be considered phone.

(6) *Pulse.* Emissions having designators with K, L, M, P, Q, V or W as the first symbol; 0, 1, 2, 3, 7, 8, 9 or X as the second symbol; A, B, C, D, E, F, N, W or X as the third symbol.

(7) *RTTY.* Narrow-band direct-printing telegraphy emissions having designators with A, C, D, F, G, H, J or R as the first symbol; 1 as the second symbol; B as the third symbol; and emission J2B. Only a digital code of a type specifically authorized in this Part may be transmitted.

(8) *SS.* Spread-spectrum emissions using bandwidth-expansion modulation emissions having designators with A, C, D, F, G, H, J or R as the first symbol; X as the second symbol; X as the third symbol. Only a SS emission of a type specifically authorized in this Part may be transmitted.

(9) *Test.* Emissions containing no information having the designators with N as the third symbol. Test does not include pulse emissions with no information or modulation unless pulse emissions are also authorized in the frequency band.

§ 97.5 Station license required.

(a) When a station is transmitting on any amateur service frequency from a geographic location within 50 km of the Earth's surface where the amateur service is regulated by the FCC, the person having physical control of the apparatus must hold an FCC-issued written authorization for an amateur station.

(b) When a station is transmitting on any amateur service frequency from a location within 50 km of the Earth's surface and aboard any vessel or craft that is documented or registered in the United States, the person having physical control of the apparatus must hold an FCC-issued written authorization for an amateur station.

(c) When a station is transmitting on any amateur-satellite service frequency from a location more than 50 km above the Earth's surface aboard any craft that is documented or registered in the United States, the person having physical control of the apparatus must hold an FCC-issued written authorization for an amateur station.

(d) The types of written authorizations that permit amateur station operation where the amateur service is regulated by the FCC are:

(1) An operator/primary station license (FCC Form 660) issued to the person by the FCC. A primary station license is issued only to a person, together with an operator license on the same document. Every amateur operator licensed by the FCC must have one, but only one, primary station license. Except a representative of a foreign government, any person who qualifies by examination is eligible to apply for an operator/primary station license.

(2) A club station license (FCC form 660) issued to the person by the FCC. A club station license is issued only to the person who is the license trustee designated by an officer of the club. The trustee must hold an FCC-issued Amateur Extra, Advanced, General, or Technician operator license. The club must be composed of at least two persons and must have a name, a document of organization, management and a primary purpose devoted to amateur service activities consistent with this Part.

(3) A military recreation station license (FCC Form 660) issued to the person by the FCC. A military recreation station license is issued only to the person who is the license custodian designated by the official in charge of the United States military recreational premises where the station is situated. The custodian must not be a representative of a foreign government. The custodian need not hold an amateur operator license.

(4) A RACES station license (FCC Form 660) issued to the person by the FCC. A RACES station license is issued only to the person who is the license custodian designated by the official responsible for the governmental agency served by that civil defense organization. The custodian must not be a representative of a foreign government. The custodian must be the civil defense official responsible for coordination of all civil defense activities in the area concerned. The custodian need not hold an amateur operator license.

(5) A reciprocal permit for alien amateur licensee (FCC Form 610-AL) issued to the person by the FCC. A reciprocal permit for alien amateur licensee is issued only to a person who is a citizen of a country with which the United States has arrangements to grant reciprocal operating permits to visiting alien amateur operators. The person must be a citizen of the same country that issued the amateur service license. No person who is a citizen of the United States, regardless of any other citizenship also held, is eligible for a reciprocal permit for alien amateur licensee. No person holding an FCC-issued amateur service license will be issued a reciprocal permit for alien amateur license.

(6) An amateur service license issued to the person by the Government of Canada. The person must be a Canadian citizen.

(e) The written authorization for an amateur station authorizes the use in accordance with the FCC Rules of all transmitting apparatus under the physical control of the station licensee at points where the amateur service is regulated by the FCC. The original written authorization document or a photocopy thereof must be retained at the station.

§ 97.7 Control operator required.

When transmitting, each amateur station must have a control operator. Only a person holding one of the following documents may be the control operator of a station:

(a) An operator/primary station license (FCC Form 660) issued to the person by the FCC.

(b) A reciprocal permit for alien amateur licensee (FCC Form 610-AL) issued to the person by the FCC.

(c) An amateur service license issued to a Canadian citizen by the Government of Canada.

§ 97.9 Operator license.

(a) There are 5 classes of operator licenses: Novice, Technician, General, Advanced and Amateur Extra. An operator license authorizes the holder to be the control operator of a station with the privileges of the operator class specified on the license. The license document or a photocopy thereof must be in the personal possession of the licensee at all times when the person is the control operator of a station.

(b) A person holding a Novice, Technician, General, or Advanced Class operator license who has properly filed with the FCC an application for a higher operator class which has not yet been acted upon, and who holds a CSCE indicating that the person completed the necessary examinations within the previous 365 days is authorized to exercise the rights and privileges of the higher operator class.

§ 97.11 Stations aboard ships or aircraft.

(a) The installation and operation of an amateur station on a ship or aircraft must be approved by the master of the ship or pilot in command of the aircraft.

(b) The station must be separate from and independent of all other radio apparatus installed on the ship or aircraft, except a common antenna may be shared with a voluntary ship radio installation. The station's transmissions must not cause interference to any other apparatus installed on the ship or aircraft.

(c) The station must not constitute a hazard to the safety of life or property. For a station aboard an aircraft, the apparatus shall not be operated while the aircraft is operating under Instrument Flight Rules, as defined by the FAA, unless the station has been found to comply with all applicable FAA Rules.

§ 97.13 Restrictions on station location.

(a) Before placing an amateur station on land of environmental importance or that is significant in American history, architecture or culture, the licensee may be required to take certain actions prescribed by §§ 1.1305-1.1319 of the FCC Rules.

(b) A station within 1600 m (1 mile) of an FCC monitoring facility must protect that facility from harmful interference. Failure to do so could result in imposition of operating restrictions upon the amateur station by an EIC pursuant to § 97.121 of this Part. Geographical coordinates of the facilities that require protection are listed in § 0.121(c) of the FCC Rules.

§ 97.15 Station antenna structures.

(a) Unless the amateur station licensee has received prior approval from the FCC, no antenna structure, including the radiating elements, tower, supports and all appurtenances, may be higher than 61 m (200 feet) above ground level at its site.

(b) Unless the amateur station licensee has received prior approval from the FCC, no antenna structure, at an airport or heliport that is available for public use and is listed in the *Airport Directory* of the current *Airman's Information Manual* or in either the *Alaska* or *Pacific*

Airman's Guide and Chart Supplement; or at an airport or heliport under construction that is the subject of a notice or proposal on file with the FAA, and except for military airports, it is clearly indicated that the airport will be available for public use; or at an airport or heliport that is operated by the armed forces of the United States; or at a place near any of these airports or heliports, may be higher than:

(1) 1 m above the airport elevation for each 100 m from the nearest runway longer than 1 km within 6.1 km of the antenna structure.

(2) 2 m above the airport elevation for each 100 m from the nearest runway longer than 1 km within 3.1 km of the antenna structure.

(3) 4 m above the airport elevation for each 100 m from the nearest landing pad within 1.5 km of the antenna structure.

(c) An amateur station antenna structure no higher than 6.1 m (20 feet) above ground level at its site or no higher than 6.1 m above any natural object or existing manmade structure, other than an antenna structure, is exempt from the requirements of paragraphs (a) and (b) of this Section.

(d) Further details as to whether an aeronautical study and/or obstruction marking and lighting may be required, and specifications for obstruction marking and lighting, are contained in Part 17 of the FCC Rules, *Construction, Marking, and Lighting of Antenna Structures*. To request approval to place an antenna structure higher than the limits specified in paragraphs (a), (b), and (c) of this Section, the licensee must notify the FAA on FAA Form 7460-1 and the FCC on FCC Form 854.

(e) Except as otherwise provided herein, a station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service communications. [State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose. *See* PRB-1, 101 FCC 2d 952 (1985) for details.]

§ 97.17 Application for new license.

(a) Any qualified person is eligible to apply for an amateur service license.

(b) Each application for a new operator/primary station license must be made on FCC Form 610. Each application for a reciprocal permit for alien amateur licensee must be made on FCC Form 610-A. No new license for a club, military recreation, or RACES station will be issued.

(c) Each application for a new operator/primary station license and each application involving a change in operator class must be submitted to the VEs administering the qualifying examination.

(d) Any qualified person is eligible to apply for a reciprocal permit for alien amateur licensee. The application must be submitted to the FCC, P.O. Box 1020, Gettysburg, PA 17326.

(e) No person shall obtain or attempt to obtain, or assist another person to obtain or attempt to obtain, an operator license or reciprocal permit for alien amateur licensee by fraudulent means.

(f) A call sign will be assigned systematically to each station. The FCC will issue public announcements detailing the policies and procedures of the call sign assignment system. The FCC will not grant any request for a specific call sign.

§ 97.19 Application for a renewed or modified license.

(a) Each application for a renewed or modified operator/primary station license must be made on FCC Form 610. Each application for a renewed or modified club, military recreation or RACES station license must be made on FCC Form 610-B. A reciprocal permit for alien amateur licensee is not renewable. A new reciprocal permit may be issued upon proper application.

(b) Each application for a renewed or modified amateur service license must be accompanied by a photocopy of the license document or the original document. Each application for a modified operator license involving a change in operator class must be submitted to the VEs administering the qualifying examination. All other applications must be submitted to: FCC, P.O. Box 1020, Gettysburg, PA 17326.

(c) When the licensee has submitted a timely application for renewal of an unexpired license (between 60 and 90 days prior to the end of the license term is recommended), the licensee may continue to operate until the disposition of the application has been determined. If a license expires, application for renewal may be made during a grace period of 2 years after the expiration date. During this grace period, the expired license is not valid. A license renewed during the grace period must be dated as of the date of the renewal.

§ 97.21 Mailing address and station location.

Each application for an amateur service license and each application for a reciprocal permit for alien amateur licensee must show a mailing address and a station location (the addresses may be the same) in an area where the amateur service is regulated by the FCC. The mailing address must be one where the licensee can receive mail delivery by the United States Postal Service. The station location must be a place where a station can be physically located. (A Postal Service box, RFD number, or general delivery is unsuitable as a station location.)

§ 97.23 License term.

(a) An amateur service license is normally issued for a 10-year term.

(b) A reciprocal permit for alien amateur licensee is normally issued for a 1-year term.

§ 97.25 FCC modification of station license.

(a) The FCC may modify a station license, either for a limited time or for the duration of the term thereof, if it determines:

(1) That such action will promote the public interest, convenience and necessity; or

(2) That such action will promote fuller compliance with the provisions of the Communications Act of 1934, as amended, or of any treaty ratified by the United States.

(b) When the FCC makes such a determination, it will issue an order of modification. The order will not become final until the licensee is notified in writing of the proposed action and the grounds and reasons therefor. The licensee will be given reasonable opportunity of no less than 30 days to protest the modification; except that, where safety of life or property is involved, a shorter period of notice may be provided. Any protest by a licensee of an FCC order of modification will be handled in accordance with the provisions of 47 U.S.C. § 316.

§ 97.27 Replacement license.

Each licensee or permittee whose original document is lost, mutilated or destroyed must request a replacement. The request must be made to: FCC, P.O. Box 1020, Gettysburg, PA 17326. A statement of how the document was lost, mutilated or destroyed must be attached to the request. A replacement license must bear the same expiration date as the license that it replaces.

Subpart B - Station Operation Standards

§ 97.101 General standards.

(a) In all respects not specifically covered by FCC Rules each amateur station must be operated in accordance with good engineering and good amateur practice.

(b) Each station licensee and each control operator must cooperate in selecting transmitting channels and in making the most effective use of the amateur service frequencies. No frequency will be assigned for the exclusive use of any station.

(c) At all times and on all frequencies, each control operator must give priority to stations providing emergency communications, except to stations transmitting communications for training drills and tests in RACES.

(d) No amateur operator shall willfully or maliciously interfere with or cause interference to any radio communication or signal.

§ 97.103 Station licensee responsibilities.

(a) The station licensee is responsible for the proper operation of the station in accordance with the FCC Rules. When the control operator is a different amateur operator than the station licensee, both persons are equally responsible for proper operation of the station.

(b) The station licensee must designate the station control operator. The FCC will presume that the station licensee is also the control operator, unless documentation to the contrary is in the station records.

(c) The station licensee must make the station and the station records available for inspection upon request by an FCC representative. When deemed necessary by an EIC to assure compliance with the FCC Rules, the station licensee must maintain a record of station operations containing such items of information as the EIC may require in accord with § 0.314(x) of the FCC Rules.

§ 97.105 Control operator duties.

(a) The control operator must ensure the immediate proper operation of the station, regardless of the type of control.

(b) A station may only be operated in the manner and to the extent permitted by the privileges authorized for the class of operator license held by the control operator.

§ 97.107 Alien control operator privileges.

(a) The privileges available to a control operator holding an amateur service license issued by the Government of Canada are:

(1) The terms of the *Convention Between the United States and Canada (TIAS No. 2508) Relating to the Operation by Citizens of Either Country of Certain Radio Equipment or Stations in the Other Country;*

(2) The operating terms and conditions of the amateur service license issued by the Government of Canada; and

(3) The applicable provisions of the FCC Rules, but not to exceed the control operator privileges of an FCC-issued Amateur Extra Class operator license.

(b) The privileges available to a control operator holding an FCC-issued reciprocal permit for alien amateur licensee are:

(1) The terms of the agreement between the alien's government and the United States;

(2) The operating terms and conditions of the amateur service license issued by the alien's government;

(3) The applicable provisions of the FCC Rules, but not to exceed the control operator privileges of an FCC-issued Amateur Extra Class operator license; and

(4) None, if the holder of the reciprocal permit has obtained an FCC-issued operator/primary station license.

(c) At any time the FCC may, in its discretion, modify, suspend, or cancel the amateur service privileges within or over any area where radio services are regulated by the FCC of any Canadian amateur service licensee or alien reciprocal permittee.

§ 97.109 Station control.

(a) Each amateur station must have at least one control point.

(b) When a station is being locally controlled, the control operator must be at the control point. Any station may be locally controlled.

(b) When a station is being remotely controlled, the control operator must be at the control point. Any station may be remotely controlled.

(c) When a station is being automatically controlled, the control operator need not be at the control point. Only stations specifically designated elsewhere in this Part may be automatically controlled. Automatic control must cease upon notification by an EIC that the station is transmitting improperly or causing harmful interference to other stations. Automatic control must not be resumed without prior approval of the EIC.

(d) No station may be automatically controlled while transmitting third-party traffic, except a station retransmitting digital packet radio communications on the 6 m and shorter wavelength bands. Such stations must be

using the American Radio Relay League, Inc. *AX.25 Amateur Packet - Radio Link - Layer Protocol, Version 2.0*, October 1984 (or compatible). The retransmitted messages must originate at a station that is being locally or remotely controlled.

§ 97.111 Authorized transmissions.

(a) An amateur station may transmit the following types of two-way communications:

(1) Transmissions necessary to exchange messages with other stations in the amateur service, except those in any country whose administration has given notice that it objects to such communications. The FCC will issue public notices of current arrangements for international communications;

(2) Transmissions necessary to exchange messages with a station in another FCC-regulated service while providing emergency communications;

(3) Transmissions necessary to exchange messages with a United States government station, necessary to providing communications in RACES; and

(4) Transmissions necessary to exchange messages with a station in a service not regulated by the FCC, but authorized by the FCC to communicate with amateur stations. An amateur station may exchange messages with a participating United States military station during an Armed Forces Day Communications Test.

(b) In addition to one-way transmissions specifically authorized elsewhere in this Part, an amateur station may transmit the following types of one-way communications:

(1) Brief transmissions necessary to make adjustments to the station;

(2) Brief transmissions necessary to establishing two-way communications with other stations;

(3) Transmissions necessary to remotely control a device from a distant location;

(4) Transmissions necessary to providing emergency communications;

(5) Transmissions necessary to assisting persons learning, or improving proficiency in, the international Morse code; and

(6) Transmissions necessary to disseminate information bulletins.

§ 97.113 Prohibited transmissions.

(a) No amateur station shall transmit any communication the purpose of which is to facilitate the business or commercial affairs of any party. No station shall transmit communications as an alternative to other authorized radio services, except as necessary to providing emergency communications. A station may, however, transmit communications to:

(1) Facilitate the public's safe observation of, or safe participation in, a parade, race, marathon or similar public gathering. No amateur station shall transmit communications concerning moving, supplying and quartering observers and participants for any sponsoring organization unless the principal beneficiary of such communications is the public and any benefit to the sponsoring organization is incidental.

(2) Inform other amateur operators of the availability of apparatus normally used in an amateur station, including such apparatus for sale or trade. This exception is not authorized to any person seeking to derive a profit by buying or selling such apparatus on a regular basis.

(b) No station shall transmit messages for hire or for material compensation, direct or indirect, paid or promised. The control operator of a club station, however, may accept compensation for such periods of time during which the station is transmitting telegraphy practice or information bulletins provided that:

(1) The station transmits the telegraphy practice and information bulletins for at least 40 hours per week;

(2) The station schedules operations on all amateur service MF and HF bands using reasonable measures to maximize coverage;

(3) The schedule of normal operating times and frequencies is published at least 30 days in advance of the actual transmissions; and

(4) The control operator does not accept any direct or indirect compensation for periods during which the station is transmitting any other material.

(c) No station shall transmit communications in order to engage in any form of broadcasting, nor to engage in any activity related to program production or newsgathering for broadcasting purposes. A station may, however, transmit communications to convey news information about an event for dissemination to the public when the following conditions are present:

(1) The information involves the immediate safety of life of individuals or the immediate protection of property;

(2) The information is directly related to the event;

(3) The information cannot be transmitted by any other means because normal communications systems have been disrupted or because there are no other communication systems available at the place where the information is originated; and

(4) Other means of communication could not be reasonably provided before or at the time of the event.

(d) No station shall transmit: music; radiocommunications or messages for any purpose, or in connection with any activity, that is contrary to federal, state, or local law; messages in codes or ciphers where the intent is to obscure the meaning (except where specifically excepted elsewere in this Part); obscene, indecent, or profane words, language, or meaning; and/or false or deceptive messages or signals.

(e) No station shall retransmit programs or signals emanating from any type of radio station other than an amateur station, except communications originating on United States Government frequencies between a space shuttle and its associated Earth stations. Prior approval for such retransmissions must be obtained from the National Aeronautics and Space Administration. Such retransmissions must be for the exclusive use of amateur operators.

(f) No amateur station, except an auxiliary, repeater or space station, may automatically retransmit the radio signals of other amateur stations.

§ 97.115 Third party communications.

(a) An amateur station may transmit messages for a third party to:

(1) Any station within the jurisdiction of the United States.

(2) Any station within the jurisdiction of any foreign government whose administration has made arrangements with the United States to allow amateur stations to be used for transmitting international communications on behalf of third parties. No station shall transmit messages for a third party to any station within the jurisdiction of any foreign government whose administration has not made such an arrangement. This prohibition does not apply to a message for any third party who is eligible to be a control operator of the station.

(b) The third party may participate in stating the message where:

(1) The control operator is present at the control point and is continuously monitoring and supervising the third party's participation; and

(2) The third party is not a prior amateur service licensee whose license was revoked; suspended for less than the balance of the license term and the suspension is still in effect; suspended for the balance of the license term and relicensing has not taken place; or surrendered for cancellation following notice of revocation, suspension or monetary forfeiture proceedings. The third party may not be the subject of a cease and desist order which relates to amateur service operation and which is still in effect.

(c) At the end of an exchange of international third party communications, the station must also transmit in the station identification procedure the call sign of the station with which a third party message was exchanged.

§ 97.117 International communications.

Transmissions to a different country, where permitted, shall be made in plain language and shall be limited to messages of a technical nature relating to tests, and, to remarks of a personal character for which, by reason of their unimportance, recourse to the public telecommunications service is not justified.

§ 97.119 Station identification.

(a) Each amateur station, except a space station or telecommand station, must transmit its assigned call sign on its transmitting channel at the end of each communication, and at least every 10 minutes during a communication, for the purpose of clearly making the source of the transmissions from the station known to those receiving the transmissions. No station may transmit unidentified communications or signals, or transmit as the station call sign, any call sign not authorized to the station.

(b) The call sign must be transmitted with an emission authorized for the transmitting channel in one of the following ways:

(1) By a CW emission. When keyed by an automatic device used only for identification, the speed must not exceed 20 words per minute;

(2) By a phone emission in the English language. Use of a phonetic alphabet as an aid for correct station identification is encouraged;

(3) By a RTTY emission when all or part of the communications are transmitted in the same digital code as the station identification, or when the communications consist of a data emission transmitted on the VHF 6 m or shorter wavelength band;

(4) By an image emission conforming to the applicable transmission standards, either color or monochrome, of § 73.682(a) of the FCC Rules when all or part of the communications are transmitted in the same image emission; or

(5) By a CW or phone emission during SS emission transmission on a narrow bandwidth frequency segment. Alternatively, by the changing of one or more parameters of the emission so that a conventional CW or phone emission receiver can be used to determine the station call sign.

(c) An indicator may be included with the call sign. It must be separated from the call sign by the slant mark or by any suitable word that denotes the slant mark.

(d) When the operator license class held by the control operator exceeds that of the station licensee, an indicator consisting of the call sign assigned to the control operator's station must be included after the call sign.

(e) When the control operator is using privileges on the basis of holding a CSCE, an indicator must be included after the call sign as follows:

(1) KT for Technician Class operator;

(2) AG for General Class operator;

(3) AA for Advanced Class operator; or

(4) AE for Amateur Extra Class operator.

(f) When the station is transmitting under the authority of a reciprocal permit for alien amateur licensee, an indicator consisting of the appropriate letter-numeral designating the station location must be included before the call sign issued to the station by the licensing country. When the station is transmitting under the authority of an amateur service license issued by the Government of Canada, a station location indicator must be included after the call sign. At least once during each intercommunication, the identification announcement must include the geographical location as nearly as possible by city and state, commonwealth or possession.

(g) A self-assigned indicator may be included after the call sign. The identifier must not conflict with any other indicator specified by the FCC Rules or by a prefix assigned to another country.

§ 97.121 Restricted operation.

(a) If the operation of an amateur station causes general interference to the reception of transmissions from stations operating in the domestic broadcast service when receivers of good engineering design, including adequate selectivity characteristics, are used to receive such transmissions, and this fact is made known to the amateur station licensee, the amateur station shall not be operated during the hours from 8 p.m. to 10:30 p.m., local time, and on Sunday for the additional period from 10:30 a.m. until 1 p.m., local time, upon the frequency or frequencies used when the interference is created.

(b) In general, such steps as may be necessary to minimize interference to stations operating in other services may be required after investigation by the FCC.

Subpart C - Special Operations

§ 97.201 Auxiliary station.

(a) Any amateur station licensed to a holder of a Technician, General, Advanced or Amateur Extra Class operator license may be an auxiliary station. A holder of a Technician, General, Advanced or Amateur Extra Class operator license may be the control operator of an auxiliary station, subject to the privileges of the class of operator license held.

(b) An auxiliary station may transmit only on the 1.25 m and shorter wavelength bands, except the 220.0-220.5 MHz, 431-433 MHz and 435-438 MHz segments.

(c) Where an auxiliary station causes harmful interference to another auxiliary station, the licensees are equally and fully responsible for resolving the interference unless one station's operation is recommended by a frequency coordinator and the other station's is not. In that case, the licensee of the non-coordinated auxiliary station has primary responsibilty to resolve the interference.

(d) An auxiliary station may be automatically controlled only when it is part of a system that includes a repeater station also being automatically controlled.

(e) An auxiliary station may transmit one-way communications.

§ 97.203 Beacon station.

(a) Any amateur station licensed to a holder of a Technician, General, Advanced or Amateur Extra Class operator license may be a beacon. A holder of a Technician, General, Advanced or Amateur Extra Class operator license may be the control operator of a beacon, subject to the privileges of the class of operator license held.

(b) A beacon must not concurrently transmit on more than 1 channel in the same amateur service frequency band, from the same station location.

(c) The transmitter power of a beacon must not exceed 100 W.

(d) A beacon may be automatically controlled while it is transmitting on the 28.20-28.30 MHz, 50.06-50.08 MHz, 144.05-144.06 MHz, 220.05-220.06 MHz, 222.05-222.06 MHz or 432.07-432.08 MHz segments, or on the 33 cm and shorter wavelength bands.

(e) Before establishing an automatically controlled beacon in the National Radio Quiet Zone or before changing the transmitting frequency, transmitter power, antenna height or directivity, the station licensee must give written notification thereof to the Interference Office, National Radio Astronomy Observatory, P.O. Box 2, Green Bank, WV 24944.

(1) The notification must include the geographical coordinates of the antenna, antenna ground elevation above mean sea level (AMSL), antenna center of radiation above ground level (AGL), antenna directivity, proposed frequency, type of emission, and transmitter power.

(2) If an objection to the proposed operation is received by the FCC from the National Radio Astronomy Observatory at Green Bank, Pocahontas County, WV, for itself or on behalf of the Naval Research Laboratory at Sugar Grove, Pendleton County, WV, within 20 days from the date of notification, the FCC will consider all aspects of the problem and take whatever action is deemed appropriate.

(f) A beacon must cease transmissions upon notification by an EIC that the station is operating improperly or causing undue interference to other operations. The beacon may not resume transmitting without prior approval of the EIC.

(g) A beacon may transmit one-way communications.

§ 97.205 Repeater station.

(a) Any amateur station licensed to a holder of a Technician, General, Advanced or Amateur Extra Class operator license may be a repeater. A holder of a Technician, General, Advanced or Amateur Extra Class operator license may be the control operator of a repeater, subject to the privileges of the class of operator license held.

(b) A repeater may receive and retransmit only on the 10 m and shorter wavelength frequency bands except the 28.0-29.5 MHz, 50.0-52.0 MHz, 144.0-144.5 MHz, 145.5-146.0 MHz, 220.0-220.5 MHz, 431.0-433.0 MHz and 435.0-438.0 MHz segments.

(c) Where the transmissions of a repeater cause harmful interference to another repeater, the two station licensees are equally and fully responsible for resolving the interference unless the operation of one station is recommended by a frequency coordinator and the operation of the other station is not. In that case, the licensee of the non-coordinated repeater has primary responsibility to resolve the interference.

(d) A repeater may be automatically controlled.

(e) Ancillary functions of a repeater that are available to users on the input channel are not considered remotely controlled functions of the station. Limiting the use of a repeater to only certain user stations is permissible.

(f) Before establishing a repeater in the National Radio Quiet Zone or before changing the transmitting frequency, transmitter power, antenna height or directivity, or the location an existing repeater, the station licensee must give written notification thereof to the Interference Office, National Radio Astronomy Observatory, P.O. Box 2, Green Bank, WV 24944.

(1) The notification must include the geographical coordinates of the station antenna, antenna ground elevation above mean sea level (AMSL), antenna center of radiation above ground level (AGL), antenna directivity, proposed frequency, type of emission, and transmitter power.

(2) If an objection to the proposed operation is received by the FCC from the National Radio Astronomy Observatory at Green Bank, Pocahontas County, WV, for itself or on behalf of the Naval Research Laboratory at Sugar Grove, Pendleton County, WV, within 20 days from the date of notification, the FCC will consider all aspects of the problem and take whatever action is deemed appropriate.

§ 97.207 Space station.

(a) Any amateur station licensed to a holder of an Amateur Extra Class operator license may be a space station. A holder of any class operator license may be the

control operator of a space station, subject to the privileges of the class of operator license held by the control operator.

(b) A space station must be capable of effecting a cessation of transmissions by telecommand whenever such cessation is ordered by the FCC.

(c) The following frequency bands and segments are authorized to space stations:

(1) The 15 m, 12 m, 10 m, 6 mm, 4 mm, 2 mm and 1 mm bands; and

(2) The 7.0-7.1 MHz, 14.00-14.25 MHz, 144-146 MHz, 2400-2450 MHz, 3.40-3.41 GHz, 5.83-5.85 GHz, 10.45-10.50 GHz and 24.00-24.05 GHz segments.

(d) A space station may automatically retransmit the radio signals of Earth stations and other space stations.

(e) A space station may transmit one-way communications.

(f) Results of measurements made in the space station, including those related to the function of the station, transmitted by a space station may consist of specially coded messages intended to facilitate communications.

(g) The licensee of each space station must give two written, pre-space station notifications to the Private Radio Bureau, FCC, Washington, DC 20554. Each notification must be in accord with the provisions of Articles 11 and 13 of the Radio Regulations.

(1) The first notification is required no less than 27 months prior to initiating space station transmissions and must specify the information required by Appendix 4 and Resolution No. 642 of the Radio Regulations.

(2) The second notification is required no less than 5 months prior to initiating space station transmissions and must specify the information required by Appendix 3 and Resolution No. 642 of the Radio Regulations.

(h) The licensee of each space station must give a written, in-space station notification to the Private Radio Bureau, FCC, Washington, DC 20554, no later than 7 days following initiation of space station transmissions. The notification must update the information contained in the pre-space notification.

(i) The licensee of each space station must give a written, post-space station notification to the Private Radio Bureau, FCC, Washington, DC 20554, no later than 3 months after termination of the space station transmissions. When the termination is ordered by the FCC, notification is required no later than 24 hours after termination.

§ 97.209 Earth station.

(a) Any amateur station may be an Earth station. A holder of any class operator license may be the control operator of an Earth station, subject to the privileges of the class of operator license held by the control operator.

(b) The following frequency bands and segments are authorized to Earth stations:

(1) The 15 m, 12 m, 10 m, 6 mm, 4 mm, 2 mm and 1 mm bands; and

(2) The 7.0-7.1 MHz, 14.00-14.25 MHz, 144-146 MHz, 435-438 MHz, 1260-1270 MHz and 2400-2450 MHz, 3.40-3.41 GHz, 5.65-5.67 GHz, 10.45-10.50 GHz and 24.00-24.05 GHz segments.

§ 97.211 Telecommand station.

(a) Any amateur station designated by the licensee of a space station is eligible to transmit as a telecommand station for that space station, subject to the privileges of the class of operator license held by the control operator.

(b) A telecommand station may transmit special codes intended to obscure the meaning of telecommand messages to the station in space operation.

(c) The following frequency bands and segments are authorized to telecommand stations:

(1) The 15 m, 12 m and 10 m bands, 6 mm, 4 mm, 2 mm and 1 mm bands.

(2) The 7.0-7.1 MHz, 14.00-14.25 MHz, 144-146 MHz, 435-438 MHz, 1260-1270 MHz and 2400-2450 MHz, 3.40-3.41 GHz, 5.65-5.67 GHz, 10.45-10.50 GHz and 24.00-24.05 GHz segments;

(d) A telecommand station may transmit one-way communications.

§ 97.213 Remote control of a station.

An amateur station may be remotely controlled where:

(a) There is a radio or wireline control link between the control point and the station sufficient for the control operator to perform his/her duties. If radio, the control link must use an auxiliary station. A control link using a fiber optic cable or another telecommunication service is considered wireline.

(b) Provisions are incorporated to limit transmission by the station to a period of no more than 3 minutes in the event of malfunction in the control link.

(c) The station is protected against making, willfully or negligently, unauthorized transmissions.

(d) A photocopy of the station license and a label with the name, address, and telephone number of the station licensee and at least one designated control operator is posted in a conspicuous place at the station location.

§ 97.215 Remote control of model craft.

An amateur station transmitting signals to control a model craft may be operated as follows:

(a) The station identification procedure is not required for transmissions directed only to the model craft, provided that a label indicating the station call sign and the station licensee's name and address is affixed to the station transmitter.

(b) The control signals are not considered codes or ciphers intended to obscure the meaning of the communication.

(c) The transmitter power must not exceed 1 W.

Subpart D - Technical Standards

§ 97.301 Authorized frequency bands.

The following transmitting frequency bands are available to an amateur station located within 50 km of the Earth's surface, within the specified ITU Region and out-

side any area where the amateur service is regulated by another country or another United States government agency.

(a) For a station having a control operator holding a Technician, General, Advanced or Amateur Extra Class operator license:

Wavelength band	ITU Region 1	ITU Region 2	ITU Region 3	Sharing requirements See § 97.303, Paragraph:
VHF	MHz	MHz	MHz	
6 m	---	50-54	50-54	(a)
2 m	144-146	144-148	144-148	(a)
1.25 m	---	220-225	---	(a), (b), (e)
UHF	MHz	MHz	MHz	
70 cm	430-440	420-450	430-440	(a), (b), (f)
33 cm	---	902-928	---	(a), (b), (g)
23 cm	1240-1300	1240-1300	1240-1300	(j)
13 cm	2300-2310	2300-2310	2300-2310	(a), (b), (j)
-do-	2390-2450	2390-2450	2390-2450	(a), (b), (j)
SHF	GHz	GHz	GHz	
9 cm	---	3.3-3.5	3.3-3.5	(a), (b), (k), (l)
5 cm	5.650-5.850	5.650-5.925	5.650-5.850	(a), (b), (m)
3 cm	10.00-10.50	10.00-10.50	10.00-10.50	(b), (c), (i), (n)
1.2 cm	24.00-24.25	24.00-24.25	24.00-24.25	(a), (b), (i), (o)
EHF	GHz	GHz	GHz	
6 mm	47.0-47.2	47.0-47.2	47.0-47.2	
4 mm	75.5-81.0	75.5-81.0	75.5-81.0	(b), (c), (h)
2.5 mm	119.98-120.02	119.98-120.02	119.98-120.02	(k), (p)
2 mm	142-149	142-149	142-149	(b), (c), (h), (k)
1 mm	241-250	241-250	241-250	(b), (c), (h), (q)
---	above 300	above 300	above 300	(k)

(b) For a station having a control operator holding an Amateur Extra Class operator license:

Wavelength band	ITU Region 1	ITU Region 2	ITU Region 3	Sharing requirements See § 97.303, Paragraph:
MF	kHz	kHz	kHz	
160 m	1810-1850	1800-2000	1800-2000	(a), (b), (c)
HF	MHz	MHz	MHz	
80 m	3.50-3.75	3.50-3.75	3.50-3.75	(a)
75 m	3.75-3.80	3.75-4.00	3.75-3.90	(a)
40 m	7.0-7.1	7.0-7.3	7.0-7.1	(a)
30 m	10.10-10.15	10.10-10.15	10.10-10.15	(d)
20 m	14.00-14.35	14.00-14.35	14.00-14.35	
17 m	18.068-18.168	18.068-18.168	18.068-18.168	
15 m	21.00-21.45	21.00-21.45	21.00-21.45	
12 m	24.89-24.99	24.89-24.99	24.89-24.99	
10 m	28.0-29.7	28.0-29.7	28.0-29.7	

(c) For a station having a control operator holding an Advanced Class operator license:

Wavelength band	ITU Region 1	ITU Region 2	ITU Region 3	Sharing requirements See § 97.303, Paragraph:
MF	kHz	kHz	kHz	
160 m	1810-1850	1800-2000	1800-2000	(a), (b), (c)
HF	MHz	MHz	MHz	
80 m	3.525-3.750	3.525-3.750	3.525-3.750	(a)
75 m	3.775-3.800	3.775-4.000	3.775-3.900	(a)
40 m	7.025-7.100	7.025-7.300	7.025-7.100	(a)
30 m	10.10-10.15	10.10-10.15	10.10-10.15	(d)
20 m	14.025-14.150	14.025-14.150	14.025-14.150	
-do-	14.175-14.350	14.175-14.350	14.175-14.350	
17 m	18.068-18.168	18.068-18.168	18.068-18.168	
15 m	21.025-21.200	21.025-21.200	21.025-21.200	
-do-	21.30-21.45	21.30-21.45	21.30-21.45	
12 m	24.89-24.99	24.89-24.99	24.89-24.99	
10 m	28.0-29.7	28.0-29.7	28.0-29.7	

(d) For a station having a control operator holding a General Class operator license:

Wavelength band	ITU Region 1	ITU Region 2	ITU Region 3	Sharing requirements See § 97.303, Paragraph:
MF	kHz	kHz	kHz	
160 m	1810-1850	1800-2000	1800-2000	(a), (b), (c)
HF	MHz	MHz	MHz	
80 m	3.525-3.750	3.525-3.750	3.525-3.750	(a)
75 m	---	3.85-4.00	---	(a)
40 m	7.025-7.100	7.025-7.100	7.025-7.100	(a)
-do-	---	7.225-7.300	---	(a)
30 m	10.10-10.15	10.10-10.15	10.10-10.15	(d)
20 m	14.025-14.150	14.025-14.150	14.025-14.150	
-do-	14.225-14.350	14.225-14.350	14.225-14.350	
17 m	18.068-18.168	18.068-18.168	18.068-18.168	
15 m	21.025-21.200	21.025-21.200	21.025-21.100	
-do-	21.30-21.45	21.30-21.45	21.30-21.45	
12 m	24.89-24.99	24.89-24.99	24.89-24.99	
10 m	28.0-29.7	28.0-29.7	28.0-29.7	

(e) For a station having a control operator holding a Technician or Novice Class operator license:

Wavelength band	ITU Region 1	ITU Region 2	ITU Region 3	Sharing requirements See § 97.303, Paragraph:
HF	MHz	MHz	MHz	
80 m	3.70-3.75	3.70-3.75	3.70-3.75	(a)
40 m	7.050-7.075	7.10-7.15	7.050-7.075	(a)
15 m	21.10-21.20	21.10-21.20	21.10-21.20	
10 m	28.1-28.5	28.1-28.5	28.1-28.5	

(f) For a station having a control operator holding a Novice Class operator license:

Wavelength band	ITU Region 1	ITU Region 2	ITU Region 3	Sharing requirements See § 97.303, Paragraph:
VHF	MHz	MHz	MHz	
1.25 m	---	222.10-223.91	---	(a), (b), (e)
UHF	MHz	MHz	MHz	
23 cm	1270-1295	1270-1295	1270-1295	(i)

§ 97.303 Frequency sharing requirements.

The following is a summary of the frequency sharing requirements that apply to amateur station transmissions on the frequency bands specified in § 97.301 of this Part. (For each ITU Region, each frequency band allocated to the amateur service is designated as either a secondary service or a primary service. A station in a secondary service must not cause harmful interference to, and must accept interference from, stations in a primary service. *See* §§ 2.105 and 2.106 of the FCC Rules, *United States Table of Frequency Allocations* for complete requirements.)

(a) Where, in adjacent ITU Regions or Subregions, a band of frequencies is allocated to different services of the same category, the basic principle is the equality of right to operate. The stations of each service in one region must operate so as not to cause harmful interference to services in the other Regions or Subregions. (*See* ITU *Radio Regulations*, No. 346 (Geneva, 1979).)

(b) No amateur station transmitting in the 1900-2000 kHz segment, the 1.25 m band, the 70 cm band, the 33 cm band, the 13 cm band, the 9 cm band, the 5 cm band, the 3 cm band, the 24.05-24.24 GHz segment, the 76-81 GHz segment, the 144-149 GHz segment and the 241-248 GHz segment shall cause harmful interference to, nor is protected from interference due to the operation of, the Government radiolocation service.

(c) No amateur station transmitting in the 1900-2000 kHz segment, the 3 cm band, the 76-81 GHz segment, the 144-149 GHz segment and the 241-248 GHz segment shall cause harmful interference to, nor is protected from interference due to the operation of, stations in the non-Government radiolocation service.

(d) No amateur station transmitting in the 30 meter band shall cause harmful interference to stations authorized by other nations in the fixed service. The licensee of the amateur station must make all necessary adjustments, including termination of transmissions, if harmful interference is caused.

(e) The 1.25 m band is allocated to the amateur, fixed and mobile services in the United States on a co-primary basis. The basic principle that applies is the equality of right to operate. Amateur, fixed and mobile stations must operate so as not to cause harmful interference to each other.

(f) In the 70 cm band:

(1) No amateur station shall transmit from north of Line A in the 420-430 MHz segment.

(2) The 420-430 MHz segment is allocated to the amateur service in the United States on a secondary basis, and is allocated in the fixed and mobile (except aeronautical mobile) services in the International Table of allocations on a primary basis. No amateur station transmitting in this band shall cause harmful interference to, nor is protected from interference due to the operation of, stations authorized by other nations in the fixed and mobile (except aeronautical mobile) services.

(3) The 430-440 MHz segment is allocated to the amateur service on a secondary basis in ITU Regions 2 and 3. No amateur station transmitting in this band in ITU Regions 2 and 3 shall cause harmful interference to, nor is protected from interference due to the operation of, stations authorized by other nations in the radiolocation service. In ITU Region 1, the 430-440 MHz segment is allocated to the amateur service on a co-primary basis with the radiolocation service. As between these two services in this band in ITU Region 1, the basic principle that applies is the equality of right to operate. Amateur stations authorized by the United States and radiolocation stations authorized by other nations in ITU Region 1 shall operate so as not to cause harmful interference to each other.

(4) No amateur station transmitting in the 449.5-450 MHz segment shall cause interference to, nor is protected from interference due to the operation of stations in, the space operation service and the space research service or Government or non-Government stations for space telecommand.

(g) In the 33 cm band:

(1) No amateur station shall transmit from within the States of Colorado and Wyoming, bounded on the south by latitude 39^0 N, on the north by latitude 42^0 N, on the east by longitude 105^0 W, and on the west by longitude 108^0 W. This band is allocated on a secondary basis to the amateur service subject to not causing harmful interference to, and not receiving protection from any interference due to the operation of, industrial, scientific and medical devices, automatic vehicle monitoring systems or Government stations authorized in this band.

(2) No amateur station shall transmit from those portions of the States of Texas and New Mexico bounded on the south by latitude 31^0 41' N, on the north by latitude 34^0 30' N, on the east by longitude 104^0 11' W, and on the west by longitude 107^0 30' W.

(h) No amateur station transmitting in the 23 cm band, the 3 cm band, the 24.05-24.25 GHz segment, the 76-81 GHz segment, the 144-149 GHz segment and the 241-248 GHz segment shall cause harmful interference to, nor is protected from interference due to the operation of, stations authorized by other nations in the radiolocation service.

(i) In the 1240-1260 MHz segment, no amateur station shall cause harmful interference to, nor is protected from interference due to the operation of, stations in the radionavigation-satellite service.

(j) In the 13 cm band:

(1) The amateur service is allocated on a secondary basis in all ITU Regions. In ITU Region 1, no amateur station shall cause harmful interference to, and is not protected from interference due to the operation of, stations authorized by other nations in the fixed service. In ITU Regions 2 and 3, no station shall cause harmful interference to, and is not protected from interference due to the operation of, stations authorized by other nations in the fixed, mobile and radiolocation services.

(2) In the United States, the 2300-2310 MHz segment is allocated to the amateur service on a co-secondary basis with the Government fixed and mobile services. In this segment, the fixed and mobile services must not cause harmful interference to the amateur service. No amateur station transmitting in the 2400-2450 MHz segment is protected from interference due to the operation of industrial, scientific and medical devices on 2450 MHz.

(k) No amateur station transmitting in the 3.332-3.339 GHz and 3.3458-3525 GHz segments, the 2.5 mm band, the 144.68-144.98 GHz, 145.45- 145.75 and 146.82-147.12 GHz segments and the 343-348 GHz segment shall cause harmful interference to stations in the radio astronomy

service. No amateur station transmitting in the 300-302 GHz, 324-326 GHz, 345-347 GHz, 363-365 GHz and 379-381 GHz segments shall cause harmful interference to stations in the space research service (passive) or Earth exploration-satellite service (passive).

(l) In the 9 cm band:

(1) In ITU Regions 2 and 3, the band is allocated to the amateur service on a secondary basis.

(2) In the United States, the band is allocated to the amateur service on a co-secondary basis with the non-Government radiolocation service.

(3) In the 3.3-3.4 GHz segment, no amateur station shall cause harmful interference to, nor is protected from interference due to the operation of, stations authorized by other nations in the radiolocation service.

(4) In the 3.4-3.5 GHz segment, no amateur station shall cause harmful interference to, nor is protected from interference due to the operation of, stations authorized by other nations in the fixed and fixed-satellite service.

(m) In the 5 cm band:

(1) In the 5.650-5.725 GHz segment, the amateur service is allocated in all ITU Regions on a co-secondary basis with the space research (deep space) service.

(2) In the 5.725-5.850 GHz segment, the amateur service is allocated in all ITU Regions on a secondary basis. No amateur station shall cause harmful interference to, nor is protected from interference due to the operation of, stations authorized by other nations in the fixed-satellite service in ITU Region 1.

(3) No amateur station transmitting in the 5.725-5.875 GHz segment is protected from interference due to the operation of industrial, scientific and medical devices operating on 5.8 GHz.

(4) In the 5.650-5.850 GHz segment, no amateur station shall cause harmful interference to, nor is protected from interference due to the operation of, stations authorized by other nations in the radiolocation service.

(5) In the 5.850-5.925 GHz segment, the amateur service is allocated in ITU Region 2 on a co-secondary basis with the radiolocation service. In the United States, the segment is allocated to the amateur service on a secondary basis to the non-Government fixed-satellite service. No amateur station shall cause harmful interference to, nor is protected from interference due to the operation of, stations authorized by other nations in the fixed, fixed-satellite and mobile services. No amateur station shall cause harmful interference to, nor is protected from interference due to the operation of, stations in the non-Government fixed-satellite service.

(n) In the 3 cm band:

(1) In the United States, the 3 cm band is allocated to the amateur service on a co-secondary basis with the non-government radiolocation service.

(2) In the 10.00-10.45 segment in ITU Regions 1 and 3, no amateur station shall cause interference to, nor is protected from interference due to the operation of, stations authorized by other nations in the fixed and mobile services.

(o) No amateur station transmitting in the 1.2 cm band is protected from interference due to the operation of industrial, scientific and medical devices on 24.125 GHz. In the United States, the 24.05-24.25 GHz segment is allocated to the amateur service on a co-secondary basis with the non-government radiolocation and Government and non-government Earth exploration-satellite (active) services.

(p) The 2.5 mm band is allocated to the amateur service on a secondary basis. No amateur station transmitting in this band shall cause harmful interference to, nor is protected from interference due to the operation of, stations in the fixed, inter-satellite and mobile services.

(q) No amateur station transmitting in the 244-246 GHz segment of the 1 mm band is protected from interference due to the operation of industrial, scientific and medical devices on 245 GHz.

§ 97.305 Authorized emission types.

(a) An amateur station may transmit a CW emission on any frequency authorized to the control operator.

(b) A station may transmit a test emission on any frequency authorized to the control operator for brief periods for experimental purposes, except that no pulse modulation emission may be transmitted on any frequency where pulse is not specifically authorized.

(c) A station may transmit the following emission types on the frequencies indicated, as authorized to the control operator, subject to the standards specified in § 97.307(f) of this Part.

Wavelength band	Frequencies	Emission types authorized	Standards See § 97.307(f), Paragraph:
MF			
160 m	entire band	phone, image, RTTY, data	(1), (2), (3)
HF			
80 m	entire band	RTTY, data	(3), (9)
75 m	entire band	phone, image	(1), (2)
40 m	7.000-7.075 MHz	RTTY, data	(c), (9)
-do-	7.075-7.100 MHz	phone, image	(1), (2), (9), (11)
-do-	7.10-7.15 MHz	RTTY, data	(1), (9)
-do-	7.15-7.30 MHz	phone, image	(1), (2)
30 m	entire band	RTTY, data	(3)
20 m	14.00-14.15 MHz	RTTY, data	(3)
-do-	14.15-14.35 MHz	phone, image	(1), (2)
17 m	18.068-18.110 MHz	RTTY, data	(3)
-do-	18.110-18.168 MHz	phone, image	(1), (2)
15 m	21.0-21.2 MHz	RTTY, data	(3), (9)
-do-	21.20-21.45 MHz	phone, image	(1), (2)
12 m	24.89-24.93 MHz	RTTY, data	(3)
-do-	24.93-24.99 MHz	phone, image	(1), (2)
10 m	28.0-28.3 MHz	RTTY, data	(4)
-do-	28.3-29.5 MHz	phone, image	(1), (2), (10)
-do-	28.5-29.0 MHz	phone, image	(1), (2)
-do-	29.0-29.7 MHz	phone, image	(1)
VHF			
6 m	50.1-51.0 MHz	MCW, phone, image, RTTY, data	(2), (5)
-do-	51.0-54.0 MHz	MCW, phone, image, RTTY, data, test	(2), (5), (8)
2 m	144.1-148.0 MHz	MCW, phone, image, RTTY, data, test	(2), (5), (8)
1.25 m	entire band	MCW, phone, image, RTTY, data, test	(2), (5), (8)

UHF		
70 cm	entire band	MCW, phone, image, RTTY, data, SS, test ..... (6), (8)
33 cm	entire band	MCW, phone, image, RTTY, data, SS, test, pulse ..... (7), (8), (12)
23 cm	entire band	MCW, phone, image, RTTY, data, SS, test ..... (7), (8), (12)
13 cm	entire band	MCW, phone, image, RTTY, data, SS, test, pulse ..... (7), (8), (12)
SHF		
9 cm	entire band	MCW, phone, image, RTTY, data, SS, test, pulse ..... (7), (8), (12)
5 cm	entire band	MCW, phone, image, RTTY, data, SS, test, pulse ..... (7), (8), (12)
3 cm	entire band	MCW, phone, image, RTTY, data, SS, test ..... (7), (8), (12)
1.2 cm	entire band	MCW, phone, image, RTTY, data, SS, test, pulse ..... (7), (8), (12)
EHF		
6 mm	entire band	MCW, phone, image, RTTY, data, SS, test, pulse ..... (7), (8), (12)
4 mm	entire band	MCW, phone, image, RTTY, data, SS, test, pulse ..... (7), (8), (12)
2.5 mm	entire band	MCW, phone, image, RTTY, data, SS, test, pulse ..... (7), (8), (12)
2 mm	entire band	MCW, phone, image, RTTY, data, SS, test, pulse ..... (7), (8), (12)
1 mm	entire band	MCW, phone, image, RTTY, data, SS, test, pulse ..... (7), (8), (12)
---	above 300 GHz	MCW, phone, image, RTTY, data, SS, test, pulse ..... (7), (8), (12)

§ 97.307 Emission standards.

(a) No amateur station transmission shall occupy more bandwidth than necessary for the information rate and emission type being transmitted, in accordance with good amateur practice.

(b) Emissions resulting from modulation must be confined to the band or segment available to the control operator. Emissions outside the necessary bandwidth must not cause splatter or keyclick interference to operations on adjacent frequencies.

(c) All spurious emissions from a station transmitter must be reduced to the greatest extent practicable. If any spurious emission, including chassis or power line radiation, causes harmful interference to the reception of another radio station, the licensee of the interfering amateur station is required to take steps to eliminate the interference, in accordance with good engineering practice.

(d) The mean power of any spurious emission from a station transmitter or external RF power amplifier transmitting on a frequency below 30 MHz must not exceed 50 mW and must be at least 40 dB below the mean power of the fundamental emission. For a transmitter of mean power less than 5 W, the attenuation must be at least 30 dB. A transmitter built before April 15, 1977, or first marketed before January 1, 1978, is exempt from this requirement.

(e) The mean power of any spurious emission from a station transmitter or external RF power amplifier transmitting on a frequency between 30-225 MHz must be at least 60 dB below the mean power of the fundamental. For a transmitter having a mean power of 25 W or less, the mean power of any spurious emission supplied to the antenna transmission line must not exceed 25 uW and must be at least 40 dB below the mean power of the fundamental emission, but need not be reduced below the power of 10 uW. A transmitter built before April 15, 1977, or first marketed before January 1, 1978, is exempt from this requirement.

(f) The following standards and limitations apply to transmissions on the frequencies specified in § 97.305(c) of this Part.

(1) No angle-modulated emission may have a modulation index greater than 1 at the highest modulation frequency.

(2) No non-phone emission shall exceed the bandwidth of a communications quality phone emission of the same modulation type. The total bandwidth of an independent sideband emission (having B as the first symbol), or a multiplexed image and phone emission, shall not exceed that of a communications quality A3E emission.

(3) Only a RTTY or data emission using a specified digital code listed in § 97.309(a) of this Part may be transmitted. The symbol rate must not exceed 300 bauds, or for frequency-shift keying, the frequency shift between mark and space must not exceed 1 kHz.

(4) Only a RTTY or data emission using a specified digital code listed in § 97.309(a) of this Part may be transmitted. The symbol rate must not exceed 1200 bauds. For frequency-shift keying, the frequency shift between mark and space must not exceed 1 kHz.

(5) A RTTY, data or multiplexed emission using a specified digital code listed in § 97.309(a) of this Part may be transmitted. The symbol rate must not exceed 19.6 kilobauds. For frequency-shift keying, the frequency shift between mark and space must not exceed 1 kHz. A RTTY, data or multiplexed emission using an unspecified digital code under the limitations listed in § 97.309(b) of this Part also may be transmitted. The authorized bandwidth is 20 kHz.

(6) A RTTY, data or multiplexed emission using a specified digital code listed in § 97.309(a) of this Part may be transmitted. The symbol rate must not exceed 56 kilobauds. For frequency-shift keying, the frequency shift between mark and space must not exceed 1 kHz. A RTTY, data or multiplexed emission using an unspecified digital code under the limitations listed in § 97.309(b) of this Part also may be transmitted. The authorized bandwidth is 100 kHz.

(7) A RTTY, data or multiplexed emission using a specified digital code listed in § 97.309(a) of this Part or an unspecified digital code under the limitations listed in § 97.309(b) of this Part may be transmitted.

(8) A RTTY or data emission having designators with A, B, C, D, E, F, G, H, J or R as the first symbol; 1, 2, 7 or 9 as the second symbol; and D or W as the third symbol is also authorized.

(9) A station having a control operator holding a Novice or Technician Class operator license may only transmit a CW emission using the international Morse code.

(10) A station having a control operator holding a Novice or Technician Class operator license may only transmit a CW emission using the international Morse code or phone emissions J3E and R3E.

(11) Phone and image emissions may be transmitted only by stations located in ITU Regions 1 and 3, and by stations located within ITU Region 2 that are west of 130^0 West longitude or south of 20^0 North latitude.

(12) Emission F8E may be transmitted.

§ 97.309 RTTY and digital emission codes.

(a) Where authorized by §§ 97.305(c) and 97.307(f) of this Part, an amateur station may transmit a RTTY or data emission using the following specified digital codes:

(1) The 5-unit, start-stop, International Telegraph Alphabet No. 2, code defined in International Telegraph and Telephone Consultative Committee Recommendation F.1, Division C, and extensions as provided for in CCITT Recommendation T.61 (Malaga-Torremolinos, 1984).

(2) The 7-unit code specified in International Radio Consultative Committee Recommendation CCIR 476-1 (1978), 476-3(1982), 476-4 (1986) or 625 (1986).

(3) The 7-unit code defined in American National Standards Institute X3.4-1977 or International Alphabet No. 5 as defined in International Telegraph and Telephone Consultative Committee Recommendation T.50 or in International Organization for Standardization, International Standard ISO 646 (1983).

(b) Where authorized by §§ 97.305(c) and 97.307(f) of this Part, a station may transmit a RTTY or data emission using an unspecified digital code, except to a station in a country with which the United States does not have an agreement permitting the code to be used. RTTY and data emissions using unspecified digital codes must not be transmitted for the purpose of obscuring the meaning of any communication. When deemed necessary by an EIC to assure compliance with the FCC Rules, a station must:

(1) Cease the transmission using the unspecified digital code;

(2) Restrict transmissions of any digital code to the extent instructed;

(3) Maintain a record, convertible to the original information, of all digital communications transmitted.

§ 97.311 SS emission types.

(a) SS emission transmissions by an amateur station are authorized only for communications between points within areas where the amateur service is regulated by the FCC. SS emission transmissions must not be used for the purpose of obscuring the meaning of any communication.

(b) Stations transmitting SS emission must not cause harmful interference to stations employing other authorized emissions, and must accept all interference caused by stations employing other authorized emissions. For the purposes of this paragraph, unintended triggering of carrier operated repeaters is not considered to be harmful interference.

(c) Only the following types of SS emission transmissions are authorized (hybrid SS emissions transmissions involving both spreading techniques are prohibited):

(1) Frequency hopping where the carrier of the transmitted signal is modulated with unciphered information and changes frequency at fixed intervals under the direction of a high speed code sequence.

(2) Direct sequence where the information is modulo-2 added to a high speed code sequence. The combined information and code are then used to modulate the RF carrier. The high speed code sequence dominates the modulation function, and is the direct cause of the wide spreading of the transmitted signal.

(d) The only spreading sequences that are authorized are from the output of one binary linear feedback shift register (which may be implemented in hardware or software).

(1) Only the following sets of connections may be used:

Number of stages in shift register	Taps used in feedback
7	7, 1
13	13, 4, 3, 1
19	19, 5, 2, 1

(2) The shift register must not be reset other than by its feedback during an individual transmission. The shift register output sequence must be used without alteration.

(3) The output of the last stage of the binary linear feedback shift register must be used as follows:

(i) For frequency hopping transmissions using x frequencies, n consecutive bits from the shift register must be used to select the next frequency from a list of frequencies sorted in ascending order. Each consecutive frequency must be selected by a consecutive block of n bits. (Where n is the smallest integer greater than $\log_2 x$.)

(ii) For direct sequence transmissions using m-ary modulation, consecutive blocks of $\log_2 m$ bits from the shift register must be used to select the transmitted signal during each interval.

(e) The station records must document all SS emission transmissions and must be retained for a period of 1 year following the last entry. The station records must include sufficient information to enable the FCC, using the information contained therein, to demodulate all transmissions. The station records must contain at least the following:

(1) A technical description of the transmitted signal;

(2) Pertinent parameters describing the transmitted signal including the frequency or frequencies of operation and, where applicable, the chip rate, the code rate, the spreading function, the transmission protocol(s) including the method of achieving synchronization, and the modulation type;

(3) A general description of the type of information being conveyed, (voice, text, memory dump, facsimile, television, etc.);

(4) The method and, if applicable, the frequency or frequencies used for station identification; and

(5) The date of beginning and the date of ending use of each type of transmitted signal.

(f) When deemed necessary by an EIC to assure compliance with this Part, a station licensee must:

(1) Cease SS emission transmissions;

(2) Restrict SS emission transmissions to the extent instructed; and

(3) Maintain a record, convertible to the original information (voice, text, image, etc.) of all spread spectrum communications transmitted.

(g) The transmitter power must not exceed 100 W.

§ 97.313 Transmitter power standards.

(a) An amateur station must use the minimum transmitter power necessary to carry out the desired communications.

(b) No station may transmit with a transmitter power exceeding 1.5 kW PEP. Until June 2, 1990, a station transmitting emission A3E is exempt from this requirement provided the power input (both RF and direct current) to the final amplifying stage supplying RF power to the antenna feed line does not exceed 1 kW, exclusive of power for heating the cathodes of vacuum tubes.

(c) No station may transmit with a transmitter power exceeding 200 W PEP on:

(1) The 3.70-3.75 MHz, 7.10-7.15 MHz, 10.10-10.15 MHz and 21.1-21.2 MHz segments;

(2) The 28.1-28.5 MHz segment when the control operator is a Novice or Technician operator; or

(3) The 7.050-7.075 MHz segment when the station is within ITU Regions 1 or 3.

(d) No station may transmit with a transmitter power exceeding 25 W PEP on the VHF 1.25 m band when the control operator is a Novice operator.

(e) No station may transmit with a transmitter power exceeding 5 W PEP on the UHF 23 cm band when the control operator is a Novice operator.

(f) No station may transmit with a transmitter power exceeding 50 W PEP on the UHF 70 cm band from an area specified in footnote US7 to § 2.106 of the FCC Rules, unless expressly authorized by the FCC after mutual agreement, on a case-by-case basis, between the EIC of the applicable field facility and the military area frequency coordinator at the applicable military base. An Earth station or telecommand station, however, may transmit on the 435-438 MHz segment with a maximum

of 611 W effective radiated power (1 kW equivalent isotropically radiated power) without the authorization otherwise required. The transmitting antenna elevation angle between the lower half-power (-3 dB relative to the peak or antenna bore sight) point and the horizon must always be greater than 10^0.

(g) No station may transmit with a transmitter power exceeding 50 W PEP on the 33 cm band from within 241 km of the boundaries of the White Sands Missile Range. Its boundaries are those portions of Texas and New Mexico bounded on the south by latitude 31^0 41' North, on the east by longitude 104^0 11' West, on the north by latitude 34^0 30' North, and on the west by longitude 107^0 30' West.

§ 97.315 Type acceptance of external RF power amplifiers.

(a) No more than 1 unit of 1 model of an external RF power amplifier capable of operation below 144 MHz may be constructed or modified during any calendar year by an amateur operator for use at a station without a grant of type acceptance. No amplifier capable of operation below 144 MHz may be constructed or modified by a non-amateur operator without a grant of type acceptance from the FCC.

(b) Any external RF power amplifier or external RF power amplifier kit (see § 2.815 of the FCC Rules), manufactured, imported or modified for use in a station or attached at any station must be type accepted for use in the amateur service in accordance with Subpart J of Part 2 of the FCC Rules. This requirement does not apply if one or more of the following conditions are met:

(1) The amplifier is not capable of operation on frequencies below 144 MHz. For the purpose of this part, an amplifier will be deemed to be incapable of operation below 144 MHz if it is not capable of being easily modified to increase its amplification characteristics below 120 MHz and either:

(i) The mean output power of the amplifier decreases, as frequency decreases from 144 MHz, to a point where 0 dB or less gain is exhibited at 120 MHz; or

(ii) The amplifier is not capable of amplifying signals below 120 MHz even for brief periods without sustaining permanent damage to its amplification circuitry.

(2) The amplifier was manufactured before April 28, 1978, and has been issued a marketing waiver by the FCC, or the amplifier was purchased before April 28, 1978, by an amateur operator for use at that amateur operator's station.

(3) The amplifier was:

(i) Constructed by the licensee, not from an external RF power amplifier kit, for use at the licensee's station; or

(ii) Modified by the licensee for use at the licensee's station.

(4) The amplifier is sold by an amateur operator to another amateur operator or to a dealer.

(5) The amplifier is purchased in used condition by an equipment dealer from an amateur operator and the amplifier is further sold to another amateur operator for use at that operator's station.

(c) A list of type accepted equipment may be inspected at FCC headquarters in Washington, DC, or at any FCC field location. Any external RF power amplifier appearing on this list as type accepted for use in the amateur service may be marketed for use in the amateur service.

§ 97.317 Standards for type acceptance of external RF power amplifiers.

(a) To receive a grant of type acceptance, the amplifier must satisfy the spurious emission standards of § 97.307(d) or (e) of this Part, as applicable, when the amplifier is:

(1) Operated at its full output power;

(2) Placed in the "standby" or "off" positions, but still connected to the transmitter; and

(3) Driven with at least 50 W mean RF input power (unless a higher drive level is specified).

(b) To receive a grant of type acceptance, the amplifier must not be capable of operation on any frequency or frequencies between 24 MHz and 35 MHz. The amplifier will be deemed incapable of such operation if it:

(1) Exhibits no more than 6 dB gain between 24 MHz and 26 MHz and between 28 MHz and 35 MHz. (This gain will be determined by the ratio of the input RF driving signal (mean power measurement) to the mean RF output power of the amplifier); and

(2) Exhibits no amplification (0 dB gain) between 26 MHz and 28 MHz.

(c) Type acceptance may be denied when denial would prevent the use of these amplifiers in services other than the amateur service. The following features will result in dismissal or denial of an application for type acceptance:

(1) Any accessible wiring which, when altered, would permit operation of the amplifier in a manner contrary to the FCC Rules;

(2) Circuit boards or similar circuitry to facilitate the addition of components to change the amplifier's operating characteristics in a manner contrary to the FCC Rules;

(3) Instructions for operation or modification of the amplifier in a manner contrary to FCC Rules;

(4) Any internal or external controls or adjustments to facilitate operation of the amplifier in a manner contrary to the FCC Rules;

(5) Any internal RF sensing circuitry or any external switch, the purpose of which is to place the amplifier in the transmit mode;

(6) The incorporation of more gain in the amplifier than is necessary to operate in the amateur service; for purposes of this paragraph, the amplifer must:

(i) Not be capable of achieving designed output power when driven with less than 50 W mean RF input power;

(ii) Not be capable of amplifying the input RF driving signal by more than 15 dB, unless the amplifier has a designed transmitter power of less than 1.5 kW (in such a case, gain must be reduced by the same number of dB as the transmitter power relationship to 1.5 kW; This gain limitation is determined by the ratio of the input RF driving signal to the RF output power of the amplifier where both signals are expressed in peak envelope power or mean power);

(iii) Not exhibit more gain than permitted by paragraph (c)(6)(ii) of this Section when driven by an RF input signal of less than 50 W mean power; and

(iv) Be capable of sustained operation at its designed power level;

(7) Any attenuation in the input of the amplifer which, when removed or modified, would permit the amplifier to function at its designed transmitter power when driven by an RF frequency input signal of less than 50 W mean power; or

(8) Any other features designed to facilitate operation in a telecommunication service other than the Amateur Radio Services, such as the Citizens Band (CB) Radio Service.

Subpart E - Providing Emergency Communications.

§ 97.401 Operation during a disaster.

(a) When normal communication systems are overloaded, damaged or disrupted because a disaster has occurred, or is likely to occur, in an area where the amateur service is regulated by the FCC, an amateur station may make transmissions necessary to meet essential communication needs and facilitate relief actions.

(b) When normal communication systems are overloaded, damaged or disrupted because a natural disaster has occurred, or is likely to occur, in an area where the amateur service is not regulated by the FCC, a station assisting in meeting essential communication needs and facilitating relief actions may do so only in accord with ITU Resolution No. 640 (Geneva, 1979). The 80 m, 75 m, 40 m, 30 m, 20 m, 17m, 15 m, 12 m, and 2 m bands may be used for these purposes.

(c) When a disaster disrupts normal communication systems in a particular area, the FCC may declare a temporary state of communication emergency. The declaration will set forth any special conditions and special rules to be observed by stations during the communication emergency. A request for a declaration of a temporary state of emergency should be directed to the EIC in the area concerned.

(d) A station in, or within 92.6 km of, Alaska may transmit emissions J3E and R3E on the channel at 5.1675 Mhz for emergency communications. The channel must be shared with stations licensed in the Alaska-private fixed service. The transmitter power must not exceed 150 W.

§ 97.403 Safety of life and protection of property.

No provision of these rules prevents the use by an amateur station of any means of radiocommunication at its disposal to provide essential communication needs in connection with the immediate safety of human life and immediate protection of property when normal communication systems are not available.

§ 97.405 Station in distress.

(a) No provision of these rules prevents the use by an amateur station in distress of any means at its disposal to attract attention, make known its condition and location, and obtain assistance.

(b) No provision of these rules prevents the use by a station, in the exceptional circumstances described in paragraph (a), of any means of radiocommunications at its disposal to assist a station in distress.

§ 97.407 Radio amateur civil emergency service.

(a) No station may transmit in RACES unless it is an FCC-licensed primary, club, or military recreation station and it is certified by a civil defense organization as registered with that organization, or it is an FCC-licensed RACES station. No person may be the control operator of a RACES station, or may be the control operator of an amateur station transmitting in RACES unless that person holds a FCC-issued amateur operator license and is certified by a civil defense organization as enrolled in that organization.

(b) The frequency bands and segments and emissions authorized to the control operator are available to stations transmitting communications in RACES on a shared basis with the amateur service. In the event of an emergency which necessitates the invoking of the President's War Emergency Powers under the provisions of Section 706 of the Communications Act of 1934, as amended, 47 U.S.C. § 606, RACES stations and amateur stations participating in RACES may only transmit on the following frequencies:

(1) The 1800-1825 kHz, 1975-2000 kHz, 3.50-3.55 MHz, 3.93-3.98 MHz, 3.984-4.000 MHz, 7.079-7.125 MHz, 7.245-7.255 MHz, 10.10-10.15 MHz, 14.047-14.053 MHz, 14.22-14.23 MHz, 14.331-14.350 MHz, 21.047-21.053 MHz, 21.228-21.267 MHz, 28.55-28.75 MHz, 29.237-29.273 MHz, 29.45-29.65 MHz, 50.35-50.75 MHz, 52-54 MHz, 144.50-145.71 MHz, 146-148 MHz, 2390-2450 MHz segments;

(2) The 1.25 m, 70 cm and 23 cm bands; and

(3) The channels at 3.997 MHz and 53.30 MHz may be used in emergency areas when required to make initial contact with a military unit and for communications with military stations on matters requiring coordination.

(c) A RACES station may only communicate with:

(1) Another RACES station;

(2) An amateur station registered with a civil defense organization;

(3) A United States Government station authorized by the responsible agency to communicate with RACES stations;

(4) A station in a service regulated by the FCC whenever such communication is authorized by the FCC.

(d) An amateur station registered with a civil defense organization may only communicate with:

(1) A RACES station licensed to the civil defense organization with which the amateur station is registered;

(2) The following stations upon authorization of the responsible civil defense official for the organization with which the amateur station is registered:

(i) A RACES station licensed to another civil defense organization;

(ii) An amateur station registered with the same or another civil defense organization;

(iii) A United States Government station authorized by the responsible agency to communicate with RACES stations; and

(iv) A station in a service regulated by the FCC whenever such communication is authorized by the FCC.

(e) All communications transmitted in RACES must be specifically authorized by the civil defense organization for the area served. Only civil defense communications of the following types may be transmitted:

(1) Messages concerning impending or actual conditions jeopardizing the public safety, or affecting the national defense or security during periods of local, regional, or national civil emergencies;

(2) Messages directly concerning the immediate safety of life of individuals, the immediate protection of property, maintenance of law and order, alleviation of human suffering and need, and the combating of armed attack or sabotage;

(3) Messages directly concerning the accumulation and dissemination of public information or instructions to the civilian population essential to the activities of the civil defense organization or other authorized governmental or relief agencies; and

(4) Communications for RACES training drills and tests necessary to ensure the establishment and maintenance of orderly and efficient operation of the RACES as ordered by the responsible civil defense organization served. Such drills and tests may not exceed a total time of 1 hour per week. With the approval of the chief officer for emergency planning in the applicable State, Commonwealth, District or territory, however, such tests and drills may be conducted for a period not to exceed 72 hours no more than twice in any calendar year.

Subpart F - Qualifying Examination Systems

§ 97.501 Qualifying for an amateur operator license.

An applicant must successfully pass an examination for the issuance of a new amateur operator license and for each change in operator class. Each applicant for the class of operator license specified below must pass, or otherwise receive examination credit for, the following examination elements:

(a) Amateur Extra Class operator: Elements 1(C), 2, 3(A), 3(B), 4(A), and 4(B);

(b) Advanced Class operator: Elements 1(B) or 1(C), 2, 3(A), 3(B), and 4(A);

(c) General Class operator: Elements 1(B) or 1(C), 2, 3(A), and 3(B);

(d) Technician Class operator: Elements 1(A) or 1(B) or 1(C), 2, and 3(A);

(e) Novice Class operator: Elements 1(A) or 1(B) or 1(C), and 2.

§ 97.503 Element standards.

(a) A telegraphy examination must be sufficient to prove that the examinee has the ability to send correctly by hand and to receive correctly by ear texts in the international Morse code at not less than the prescribed speed, using all the letters of the alphabet, numerals 0-9, period, comma, question mark, slant mark and prosigns ar, bt and sk.

(1) Element 1(A): 5 words per minute;

(2) Element 1(B): 13 words per minute;

(3) Element 1(C): 20 words per minute.

(b) A written examination must be such as to prove that the examinee possesses the operational and technical qualifications required to perform properly the duties of an amateur service licensee. Each written examination must be comprised of a question set as follows:

(1) Element 2: 30 questions concerning the privileges of a Novice Class operator license. The minimum passing score is 22 questions answered correctly.

(2) Element 3(A): 25 questions concerning the additional privileges of a Technician Class operator license. The minimum passing score is 19 questions answered correctly.

(3) Element 3(B): 25 questions concerning the additional privileges of a General Class operator license. The minimum passing score is 19 questions answered correctly.

(4) Element 4(A): 50 questions concerning the additional privileges of an Advanced Class operator license. The minimum passing score is 37 questions answered correctly.

(5) Element 4(B): 40 questions concerning the additional privileges of an Amateur Extra Class operator license. The minimum passing score is 30 questions answered correctly.

(c) The topics and number of questions required in each question set are listed below for the appropriate examination element:

Topics	Element: 2	3(A)	3(B)	4(A)	4(B)
(1) FCC rules for the amateur radio services	10	5	4	6	8
(2) Amateur station operating procedures	2	3	3	1	4
(3) Radio wave propagation characteristics of amateur service frequency bands	1	3	3	2	2
(4) Amateur radio practices	4	4	5	4	4
(5) Electrical principles as applied to amateur station equipment	4	2	2	10	6
(6) Amateur station equipment circuit components	2	2	1	6	4
(7) Practical circuits employed in amateur station equipment	2	1	1	10	4
(8) Signals and emissions transmitted by amateur stations	2	2	2	6	4
(9) Amateur station antennas and feed lines	3	3	4	5	4

§ 97.505 Element credit.

§ 97.505 Element credit.

(a) The administering VEs must give credit as specified below to an examinee holding any of the following documents:

(1) An unexpired (or within the grace period) FCC-issued amateur operator license: The least elements required for the license held. For a Technician Class operator license issued before March 21, 1987, credit must also be given for Element 3(B).

(2) A CSCE: Each element the CSCE indicates the examinee passed within the previous 365 days.

(3) A photocopy of a FCC Form 610 which was submitted to the FCC indicating the examinee qualified for a Novice Class operator license within the previous 365 days: Elements 1(A) and 2.

(4) An unexpired (or expired less than 5 years) FCC-issued commercial radiotelegraph operator license or permit: Element 1(C).

(b) No examination credit, except as herein provided, shall be allowed on the basis of holding or having held any other license.

§ 97.507 Preparing an examination.

(a) Each telegraphy message and each written question set administered to an examinee must be prepared by a VE holding an FCC-issued Amateur Extra Class operator license. A telegraphy message or written question set, however, may also be prepared for the following elements by a VE holding an FCC-issued operator license of the Class indicated:

(1) Element 3(B): Advanced Class operator.

(2) Elements 1(A) and 3(A): Advanced or General Class operator.

(3) Element 2: Advanced, General or Technician Class operator.

(b) Each question set administered to an examinee must utilize questions taken from the applicable question pool.

(c) Each telegraphy message and each written question set administered to an examinee for a Technician, General, Advanced, or Amateur Extra Class operator license must be prepared, or obtained from a supplier, by the administering VEs according to instructions from the coordinating VEC.

(d) The preparation of each telegraphy message and each written question set administered to an examinee for a Novice Class operator license is the responsibility of the administering VEs. The telegraphy message and written question set may be obtained by the administering VEs from a supplier.

(e) A telegraphy examination must consist of a message sent in the international Morse code at no less than the prescribed speed for a minimum of 5 minutes. The message must contain each required telegraphy character at least once. No message known to the examinee may be administered in a telegraphy examination. Each 5 letters of the alphabet must be counted as 1 word. Each numeral, punctuation mark and prosign must be counted as 2 letters of the alphabet.

§ 97.509 Administering an examination.

(a) Each examination for an amateur operator license must be administered at a location and a time specified by the administering VEs. Each administering VE must be present and observe the examinee throughout the entire examination. The administering VEs are responsible for the proper conduct and necessary supervision of each examination. The administering VEs must immediately terminate the examination upon failure of the examinee to comply with their instructions.

(b) Each examinee must comply with the instructions given by the administering VEs.

(c) No examination that has been compromised shall be administered to any examinee. Neither the same telegraphy message nor the same question set may be readministered to the same examinee.

(d) Passing a telegraphy receiving examination is adequate proof of an examinee's ability to both send and receive telegraphy. The administering VEs, however, may also include a sending segment in a telegraphy examination.

(e) Upon completion of each examination element, the administering VEs must immediately grade the examinee's answers. The administering VEs are responsible for determining the correctness of the examinee's answers.

(f) When the examinee is credited for all examination elements required for the operator license sought, the administering VEs must certify on the examinee's application form that the applicant is qualified for the license and report the basis for the qualification.

(g) When the examinee does not score a passing grade on an examination element, the administering VEs must return the application form to the examinee and inform the examinee of the grade.

(h) The administering VEs must accommodate an examinee whose physical disabilities require a special examination procedure. The administering VEs may require a physician's certification indicating the nature of the disability before determining which, if any, special procedures must be used.

(i) The FCC may:

(1) Administer any examination element itself;

(2) Readminister any examination element previously administered by VEs, either itself or under the supervision of VEs designated by the FCC; or

(3) Cancel the operator and station licenses of any licensee who fails to appear for readministration of an examination when directed by the FCC, or who does not successfully complete any required element which is readministered. In an instance of such cancellation, the person will be issued operator and station licenses consistent with completed examination elements that have not been invalidated by not appearing for, or by failing, the examination upon readministration.

§ 97.511 Technician, General, Advanced and Amateur Extra Class operator license examination.

(a) Each session where an examination for a Technician, General, Advanced or Amateur Extra Class operator license is administered must be coordinated by a VEC. Each administering VE must be accredited by the coordinating VEC.

(b) Each examination for a Technician Class operator license must be administered by 3 administering VEs, each of whom must hold an FCC-issued Amateur Extra or Advanced Class operator license.

(c) Each examination for a General, Advanced or Amateur Extra Class operator license must be administered by 3 administering VEs, each of whom must hold an FCC-issued Amateur Extra Class operator license.

(d) The administering VEs must make a public announcement before administering an examination for Technician, General, Advanced or Amateur Extra Class operator license. The number of candidates at any examination may be limited.

(e) The administering VEs must issue a CSCE to an examinee who scores a passing grade on an examination element.

(f) Within 10 days of the administration of a successful examination for the Technician, General, Advanced or Amateur Extra Class operator license, the administering VEs must submit the application to the coordinating VEC.

§ 97.513 Novice Class operator license examination.

(a) Each examination for a Novice Class operator license must be administered by 2 VEs. The VEs do not have to be accredited by a VEC. Each administering VE must hold a current FCC-issued Amateur Extra, Advanced or General Class operator license.

(b) Within 10 days of the administration of a successful examination for a Novice Class operator license, the administering VEs must submit the application to: FCC, P.O. Box 1020, Gettysburg, PA 17326.

§ 97.515 Volunteer examiner requirements.

(a) Each administering VE must be at least 18 years of age.

(b) Any person who owns a significant interest in, or is an employee of, any company or other entity that is engaged in the manufacture or distribution of equipment used in connection with amateur station transmissions, or in the preparation or distribution of any publication used in preparation for obtaining amateur licenses, is ineligible to be an administering VE. An employee who does not normally communicate with that part of an entity engaged in the manufacture or distribution of such equipment, or in the preparation or distribution of any publication used in preparation for obtaining amateur operator licenses, is eligible to be an administering VE.

(c) No person may be a VE if that person's amateur station license or amateur operator license has ever been revoked or suspended.

(d) No VE may administer an examination to that VE's spouse, children, grandchildren, stepchildren, parents, grandparents, stepparents, brothers, sisters, stepbrothers, stepsisters, aunts, uncles, nieces, nephews, and in-laws.

§ 97.517 Volunteer examiner conduct.

No VE may administer or certify any examination by fraudulent means or for monetary or other consideration including reimbursement in any amount in excess of that permitted. Violation of this provision may result in the revocation of the VE's amateur station license and the suspension of the VE's amateur operator license.

§ 97.519 Coordinating examination sessions.

(a) A VEC must coordinate the efforts of VEs in preparing and administering examinations.

(b) At the completion of each examination session coordinated, the coordinating VEC must collect the applications and test results from the administering VEs. The coordinating VEC must screen and forward all applications for qualified examinees within 10 days of their receipt from the administering VEs to: FCC, P.O. Box 1020, Gettysburg, PA 17326.

(c) Each VEC must make any examination records available to the FCC, upon request.

§ 97.521 VEC qualifications.

No organization may serve as a VEC unless it has entered into a written agreement with the FCC. The VEC must abide by the terms of the agreement. In order to be eligible to be a VEC, the entity must:

(a) Be an organization that exists for the purpose of furthering the amateur service;

(b) Be capable of serving as a VEC in at least the VEC region (see Appendix 2) proposed;

(c) Agree to coordinate examinations for Technician, General, Advanced, and Amateur Extra Class operator licenses;

(d) Agree to assure that, for any examination, every examinee qualified under these rules is registered without regard to race, sex, religion, national origin or membership (or lack thereof) in any amateur service organization;

(e) Not be engaged in the manufacture or distribution of equipment used in connection with amateur station transmissions, or in the preparation or distribution of any publication used in preparation for obtaining amateur licenses, unless a persuasive showing is made to the FCC that preventive measures have been taken to preclude any possible conflict of interest.

§ 97.523 Question pools.

All VECs must cooperate in maintaining one question pool for each written examination element. Each question pool must contain at least 10 times the number of questions required for a single examination. Each question pool must be published and made available to the public prior to its use for making a question set. Each question on each VEC question pool must be prepared by a VE holding the required FCC-issued operator license. *See* §97.507(a) of this Part.

§ 97.525 Accrediting VEs.

(a) No VEC may accredit a person as a VE if:

(1) The person does not meet minimum VE statutory qualifications or minimum qualifications as prescribed by this Part;

(2) The FCC does not accept the voluntary and uncompensated services of the person;

(3) The VEC determines that the person is not competent to perform the VE functions; or

(4) The VEC determines that questions of the person's integrity or honesty could compromise the examinations.

(b) Each VEC must seek a broad representation of amateur operators to be VEs. No VEC may discriminate in accrediting VEs on the basis of race, sex, religion or national origin; nor on the basis of membership (or lack thereof) in an amateur service organization; nor on the basis of the person accepting or declining to accept reimbursement.

§ 97.527 Reimbursement for expenses.

(a) VEs and VECs may be reimbursed by examinees for out-of-pocket expenses incurred in preparing, processing, administering, or coordinating an examination for a Technician, General, Advanced, or Amateur Extra operator license.

(b) The maximum amount of reimbursement from any one examinee for any one examination at a particular session regardless of the number of examination elements taken must not exceed that announced by the FCC in a Public Notice. (The basis for the maximum fee is $4.00 for 1984, adjusted annually each January 1 thereafter for changes in the Department of Labor Consumer Price Index.)

(c) No reimbursement may be accepted by any VE for preparing, processing, or administering an examination for a Novice operator license.

(d) Each VE and each VEC accepting reimbursement must maintain records of out-of-pocket expenses and reimbursements for each examination session. Written certifications must be filed with the FCC each year that all expenses for the period from January 1 to December 31 of the preceding year for which reimbursement was obtained were necessarily and prudently incurred.

(e) The expense and reimbursement records must be retained by each VE and each VEC for 3 years and be made available to the FCC upon request.

(f) Each VE must forward the certification by January 15 of each year to the coordinating VEC for the examinations for which reimbursement was received. Each VEC must forward all such certifications and its own certification to the FCC on or before January 31 of each year.

(g) Each VEC must disaccredit any VE failing to provide the certification. The VEC must advise the FCC on January 31 of each year of any VE that it has disaccredited for this reason. Appendix 1 -- Places where the amateur service is regulated by the FCC.

In ITU Region 2, the amateur service is regulated by the FCC within the territorial limits of the 50 United States, District of Columbia, Caribbean Insular areas [Commonwealth of Puerto Rico, United States Virgin Islands (50 islets and cays) and Navassa Island], and Johnston Island (Islets East, Johnston, North and Sand) and Midway Island (Islets Eastern and Sand) in the Pacific Insular areas.

In ITU Region 3, the amateur service is regulated by the FCC within the Pacific Insular territorial limits of American Samoa (seven islands), Baker Island, Commonwealth of Northern Mariannas Islands, Guam Island, Howland Island, Jarvis Island, Kingman Reef, Palmyra Island (more than 50 islets) and Wake Island (Islets Peale, Wake and Wilkes).

Appendix 2 -- VEC Regions.

1. Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.

2. New Jersey and New York.

3. Delaware, District of Columbia, Maryland and Pennsylvania.

4. Alabama, Florida, Georgia, Kentucky, North Carolina, South Carolina, Tennessee and Virginia.

5. Arkansas, Louisiana, Mississippi, New Mexico, Oklahoma and Texas.

6. California.

7. Arizona, Idaho, Montana, Nevada, Oregon, Utah, Washington and Wyoming.

8. Michigan, Ohio and West Virginia.

9. Illinois, Indiana and Wisconsin.

10. Colorado, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota and South Dakota.

11. Alaska.

12. Caribbean Insular areas.

13. Hawaii and Pacific Insular areas.

FOOTNOTES

[1] 3 FCC Rcd 2076 (1988).

[2] The Amateur Radio Services consist of the amateur service, the amateur-satellite service and the radio amateur civil emergency service (RACES).

[3] *See* No. 53 of the ITU Radio Regulations (Geneva, 1979) (hereafter Radio Regulations). *See also* 47 U.S.C. § 153(q).

[4] Radio Regulation No. 2731 forbids intercommunications with an amateur station in any country that objects to such activity. Radio Regulation No. 2732 limits international amateur service communications to messages of such unimportance that recourse to public telecommunication services is not justified. Radio Regulations Nos. 2733 and 2734 forbid amateur stations from transmitting international communications on behalf of third parties unless special arrangements have been made between the concerned countries.

[5] *See* Radio Regulation No. 2737.

[6] *See* Radio Regulation No. 2736.

[7] *See* Radio Regulation Resolution No. 640.

[8] *See* 47 U.S.C. § 154(f)(4).

[9] *See* Report and Order, Docket 9295, 42 FCC 198 (1951).

[10] For example, see comments of ARRL at 2, Kevin Biekert at 1, Robert Biekert at 1, Ruth Biekert at 1, William Dunlap at 1, James Heil at 1, and James Lin at 1.

[11] For example, see comments of Victor Misek at 3, Al Schulman at 1, and R. P. Haviland at 1-3.

[12] For example, see comments of Ralph D'Orio, Jr. at 1, Warren East at 1, and Glenn Baxter at 2.

[13] For example, see comments of Fred Huntley at 1, Kansas Amateur Repeater Council, Inc. at 1, Mid-America Coordination Council, Inc. at 1 and 2, Don Hoisington at 1, Chadwick Johnson, M. D. at 1, and Patrick Hamel at 5.

[14] For example, see comments of Eric Wolfe at 1, Leslie Davis at 3, Herbert Schoenbohm at 3, ARRL at 26, D-5, and A-10, and Arthur Baker at 1. *See* also reply comments of Robert Thornburg at 1-3.

[15] For example, see comments of Hugh Hogue at 1, Vern Kaspar at 2, and Raymond Klepfer at 2.

[16] Comments of ARRL at 6. Our proposed title for Subpart B was "Fundamental Purposes of the Amateur Service." The divisions comprising Subpart B were: Serving the public, Advancing the radio art, Advancing skills, Training operators, and Enhancing international goodwill.

[17] Comments of Victor Misek at 1 and comments of Betty Marstow at 1.

[18] *See* petition for rule making filed by G. M. Howard, November 14, 1988. Although the petitioner states that his petition is not filed as a comment in this proceeding, the thrust of the petition, which seeks to interest high school students in science and mathematics, best lends itself to consideration in this proceeding.

[19] Comments of William Gardner at 1.

[20] Comments of David Castle at 1.

[21] Comments of ARRL at 3 and 4.

[22] Comments of ARRL at 23.

[23] *See* Section 97.131(b). We note that all amateur service licenses provide, as a condition of grant, that station operation is subject to the requirements of Part 97 of the Rules. Thus, Commission actions restraining a licensee's operation that are permitted under the rules do not constitute modification of the license.

[24] *See* Order, 48 Fed. Reg. 32999 (1983).

[25] For examples, see comments of John Callahan at 2 and 3, Edward Mitchell at 15 (initial comments of July 15, 1988), and Diane Thompson at 1 and 2.

[26] For examples, see comments of Santa Clara Valley Repeater Society at 3 and 4, and Henry Wyatt at 3 and 4.

[27] Comments of ARRL at 2 and 3.

[28] Comments of Joel Miller at 2-5, Ruth Kastner at 2 and 3, Edward Mitchell at 2-12, Houston Echo Society at 3, The Schenectady Amateur Radio Association, Inc. at 3, and Robert Scupp at 2 and 3.

[29] *See* Notice at paragraph 36.

[30] Comments of ARRL at 20, 21 and C-3.

[31] The National Association of Broadcasters, American Society of Newspaper Editors, CBS Inc., Capital Cities/ABC, Inc., National Broadcasting Company, Inc., National Public Radio, Post-Newsweek Stations, Inc., Reporters Committee for Freedom of the Press, and Turner Broadcasting System, Inc. joined with RTNDA in filing both comments and reply comments. RTNDA asks that its reply comments, which were filed late, be accepted because of their importance in resolving the matter of permitting amateur stations to be used for news gathering purposes. We agree that RTNDA's reply comments should be considered in this proceeding and that sufficient justification has been shown for their acceptance. They are, therefore, accepted.

[32] Our current policy is that the information be critical to protecting the immediate safety of life of individuals or the immediate protection of property and that the event must be unforeseen.

[33] Reply comments of ARRL at 7 and 8.

[34] Comments of Philip Stein at 3.

[35] Comments of ARRL at 34.

[36] *See* Order, 48 Fed. Reg. 32999 (1983), *supra*.

[37] Radio Regulation Resolution No. 640.

[38] The amateur service is for the purpose of self-training, intercommunication and technical investigations carried out by duly authorized persons interested in radio technique solely with a personal aim and without pecuniary interest. *See* Paragraph 4, *supra*. The broadcasting service is for transmissions intended for direct reception by the general public. *See* Radio Regulation No. 36.

[39] *See* Article 32 and Resolution No. 640 of the Radio Regulations.

[40] *See* comments of Ray Adams at 3.

[41] On July 15, 1987, Adams filed a petition (RM-6095) to amend Section 97.29(c) of the Commission's Rules, 47 C.F.R. § 97.29(c). That section requires a telegraphy examination to be 5 minutes in duration. Adams suggested the rule be amended to read "a minimum 5-minute test period." Mr. Adams filed a second petition (RM-6094) on July 15, 1987, to amend Section 97.21(b) of the Commission's Rules, 47 C.F.R. § 97.21(b), to permit, but not require, telegraphy tests to contain all the letters of the alphabet, numerals 0-9, punctuation and prosigns (a total of 43 characters). The petitions were dismissed without prejudice by the Acting Chief, Private Radio Bureau on September 2, 1988.

[42] *See* comments of ARRL at 31.

[43] *See* comments of Radio School at 1 and 2.

[44] *See* comments of ARRL at 31 and F-4.

[45] *See* comments of Ray Adams at 6.

[46] *See* Radio Regulation No. 2735.

[47] *See* Public Notice, August 22, 1977, FCC 77-573.

[48] *See* Article 32 of ITU Radio Regulations.

[49] Although Radio Regulation 2735 requires the examinee to prove the ability to send by hand and receive by ear, we do not interpret this as requirements for hands or hearing.

[50] Comments of ARRL at 7.

[51] *See* Article 32 of the Radio Regulations. Radio Regulation No. 2733 stipulates that "It is absolutely forbidden for amateur stations to be used for transmitting international communications on behalf of third parties." Radio Regulation No. 2734, however, provides for modification of this provision where special arrangements have been made between the concerned countries.

[52] Comments of ARRL at 11.

[53] *See* Press Notice entitled *Amateur Radio: Third Party Traffic Clarification*, 88/696, dated 30 September 1988, issued by the Department for Enterprise, United Kingdom.

[54] For example, see comments of Maryland Emergency Management and Civil Defense Agency at 3.

[55] Comments of ARRL at 27 and D-9.

[56] *See* 58 FCC 2d 120, 123 (1976).

[57] *See* Memorandum Opinion and Order, 101 FCC 2d 952 (1985).

[58] Comments of ARRL at 13 and 14.

[59] *See* comments of Anthony Sivo at 7, M. L. Gibson at 1, and Leslie Davies at 2.

[60] Comments of Alfred Laun at 1 and 2.

[61] *See* S. Rep. No. 795, 93d Cong., 2d Sess. 4 (1974).

[62] Sun City Amateur Radio Club at 4, Robert Roberts at 3, and Schenectady Amateur Radio Association, Inc. at 3.

[63] Comments of Ray Adams at 3.

[64] Comments of ARRL at 25 and D-2. *See* also comments of Santa Clara Valley Repeater Society at 4 where it is suggested that the five second cessation be changed to one minute.

[65] Comments of Ray Adams at 4.

[66] Comments of Southern California Repeater and Remote Base Association at 3.

[67] Comments of Robert McCormick at 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Lincoln Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 7-1689

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 1989; Released: June 9, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. In the *Joint Cost Order*,[1] the Commission required certain subject carriers, including the Lincoln Telephone and Telegraph Company (LT&T), to file a manual for separating costs of regulated telecommunications services from the costs of nonregulated activities. In response to this requirement, LT&T filed a cost allocation manual on August 31, 1987. This manual described LT&T's nonregulated activities, listed the activities LT&T proposed to treat as incidental activities, and provided information on LT&T's affiliate transactions, employee time reporting procedures, and cost apportionment methods.

2. We reviewed this manual in the *LT&T Order*[2] and found that certain areas of the manual required clarification or revision. Despite these problem areas, we conditionally approved LT&T's manual. We determined that the manual provided adequate assurances against the misallocation of costs and revenues between regulated and nonregulated activities to permit its implementation on January 1, 1988. We required, however, that LT&T submit revisions addressing each of the specified problem areas described in our order. We stated that these revisions would be subject to public comment and our review, and that we would take all appropriate action, including the prescription of specific apportionment procedures, in the event we disapproved any part of the revised manual.[3]

3. LT&T submitted its revisions, which provide additional information regarding the problem areas identified in the *LT&T Order*, on December 19, 1988. According to LT&T, these revisions satisfy the concerns addressed in that Order.[4] No party commented on these revisions.

4. After reviewing the contents of LT&T's revised manual, we find, subject to certain exceptions, that it is consistent with the Commission's requirements for cost allocation manuals and properly implements the *LT&T Order*. Before turning to these exceptions, we wish to emphasize that this Order does not discuss the many areas in which LT&T has complied fully with Commission requirements and the *LT&T Order*. We also wish to emphasize that the exceptions are very limited in relation to the manual as a whole. Accordingly, we approve LT&T's December 19, 1988 revisions, subject to the filing of additional information and revisions specified herein. This filing shall be made no later than June 30, 1989.

II. DISCUSSION

A. Overall Sufficiency of the Manual

5. Under the *Joint Cost Order*, each cost allocation manual must describe the nonregulated activities, incidental activities, affiliate transactions, employee time reporting procedures and cost apportionment methods of the telephone operating companies that will apply it. In the *LT&T Order*, we required LT&T to provide additional, and in certain instances, corrected information regarding each of these areas. In its revised manual, LT&T provides additional information regarding these areas.

B. Affiliate Transactions

6. In the *LT&T Order*, we indicated that it was not clear from LT&T's description of its affiliate transactions whether the asset or service rules apply. We also required LT&T to provide information on the terms of the transactions LT&T has with affiliates. In its revised manual, LT&T addresses the terms of transactions between LT&T and affiliated companies. LT&T also indicates that it charges its affiliates tariff rates for telecommunications services, and market prices or actual costs for other services. However, it is not clear whether the term "market price" meets the criteria for determining the terms of affiliate transactions because there is no definition of this term in the manual. For transactions involving the provision of a service, we determined in the *NYNEX Compliance Order*[5] that under the affiliate transaction rules, carriers normally must record services provided by nonregulated affiliates at the affiliates' fully distributed costs.[6] We held that the only general exception to this costing methodology "permits the carrier to record an affiliates' services at the market rate 'when the same services are also provided by the affiliate to unaffiliated persons or entities.'"[7] This general exception applies only if the nonregulated affiliate also supplies the same services to nonaffiliate users in a sufficiently large number of cases to establish prevailing company prices.[8] Finally, untariffed services that carriers provide to nonregulated affiliates must also be recorded at the carriers' fully distributed costs unless the carriers provide the same services to nonaffiliated entities in a sufficiently large number of cases to establish a market rate.[9] In its further revisions, LT&T must define the term "market price" and must verify that each affiliate transaction involving the provision of a service that it proposes to provide at market prices meets the above criteria.

7. If the transaction involves a transfer of assets, the carrier should record it at the prevailing price held out to the general public, that is, the prevailing company price. If there is no prevailing company price, asset transfers from the affiliate to the carrier should be recorded at the lower of net book cost or fair market value, while asset transfers from the carrier to the affiliate should be recorded at the higher of net book cost or fair market value. LT&T's definition relating to transfer of assets should conform to this definition.

C. Other Issues

8. In the *LT&T Order*, we noted that LT&T had stated that it maintains a set of nonregulated accounts and that it directly assigns costs used exclusively for nonregulated activities to these accounts. We inferred from this statement that LT&T was maintaining separate books of accounts, which is prohibited by the *Joint Cost Order*. We concluded that LT&T could not use separate books of accounts for nonregulated activities. LT&T was directed to amend its cost manual to allocate all investments, expenses, and revenues used "exclusively" for nonregulated activities to a nonregulated cost pool under the appropriate regulated account, and to assign those costs or revenues directly to nonregulated activities. In response to this directive, LT&T included Account 1406 - Nonregulated Investments and Account 7990 - Nonregulated Net Income in its revised manual, and retained a footnote on several pages of the cost apportionment table that stated either, "Plant used exclusively for nonregulated activities will be directly assigned to the appropriate nonregulated account," or "Costs which can be directly assigned to nonregulated activity are charged to the appropriate nonregulated account."[10]

9. One of the main purposes of the cost allocation manual is to allow us to verify that a carrier is correctly separating its regulated and nonregulated activities which share common plant. The costs or revenues for a nonregulated activity that share common or joint plant must be put into Part 32 accounts in which these costs or revenues are associated. In the case of activities that share no resources with regulated activities, the costs or revenues would be placed into nonregulated accounts, that are not used to compute the regulated rate base such as Accounts 1406 and 7990. This type of accounting enables us to verify whether a carrier has correctly separated its regulated and nonregulated activities. In the case of LT&T's revisions, there are no cost pools for nonregulated activities directly assigned to the account in which the investments, expenses, or revenues are incurred because LT&T is assigning these direct investments, expenses, or revenues to Accounts 1406 or 7990. Accounts 1406 and 7990 are only to be used for activities that share no resources with regulated activities. We believe that LT&T has misunderstood our concern relating to its nonregulated activities. LT&T may not have separate books of accounts for its nonregulated activities. Moreover, LT&T must assign nonregulated costs or revenues to the accounts in which these costs or revenues are associated. For example, LT&T does not create a nonregulated cost pool or apportion any directly assigned nonregulated costs to Account 1220, Material and Supplies, because the manual states that "LT&T maintains a nonregulated inventory account that is subsidiary to account 1406 for nonregulated only items."[11] In this case, we would not know how much nonregulated cost is directly assigned to Account 1220 because those costs are being aggregated into Account 1406. Consequently, we direct LT&T to revise its manual by including all directly assigned nonregulated activities in the accounts associated with the respective investments, expenses, or revenues by use of the appropriate cost pools for those accounts. Concurrently, LT&T must recalculate the amounts included in Accounts 1406 and 7990 to correspond to the changes associated with the directly assigned investments, expenses, or revenues.

III. ACCOUNT - BY - ACCOUNT ANALYSIS

Account 2112 - Motor Vehicles and Account 6112 - Motor Vehicle Expense

10. In its inital cost manual, LT&T proposed to apportion the "residual" costs in these accounts to regulated and nonregulated activities based on the general allocator. The *LT&T Order* required LT&T to define the term "residual" costs and explain why a more cost causative methodology could not be used to apportion these "residual" costs. LT&T's revised manual defines "residual" costs as "generally associated with vehicle usage, such as administrative personnel, that is not chargeable to specific plant or nonregulated activities."[12] The definition of "residual" costs appears to be an overhead type of cost, but it is not precisely defined. In addition, there is no explanation of why a general allocator is the most appropriate method to use to apportion these costs. We do not believe that the general allocator is justified here. Therefore, we require LT&T to more clearly define "residual" and require a more cost causative allocator be used.

Account 5301 - Uncollectible Revenues - Telecommunications and Account 5302 - Uncollectible Revenues - Other

11. LT&T proposes to directly assign all uncollectible revenues in Accounts 5301 and 5302 to regulated activities. We find this assignment improper for Account 5302 since some of the revenues that are uncollected could be from nonregulated activities. Consequently, we require LT&T to establish a nonregulated cost pool for Account 5302. In addition, we are uncertain as to the relationship between LT&T's booked uncollectibles and its mix of regulated and nonregulated services, and how it can directly assign uncollectibles to these accounts. We, therefore, require LT&T to either clarify how it assigns uncollectible revenue to pools or revise its manual to apportion its uncollectible revenue from its telecommunications operation in proportion to its relative telecommunications revenue and its other uncollectible revenue in proportion to its relative non-telecommunications revenue.

Account 6722 - External Relations Expense

12. In the *LT&T Order*, we required LT&T to apportion some of the expenses in the "Regulatory" relations cost pool to nonregulated activities to reflect its contact with regulatory authorities concerning nonregulated service. LT&T, in its revised manual, amended the name of this cost pool to "Tariff Development and Monitoring," which is allocated to regulated activities and a new cost pool, "Other (Business, Government, and Investor Relations)" is included and allocated to regulated and nonregulated activities based on the general allocator. We assume that the nonregulated activities associated with regulatory authorities is now included in the "Other" cost pool. However, LT&T does explain why it is using the general allocator, and we are not convinced that a general allocator for this cost pool is justified. Consequently, we require LT&T to revise its manual to apportion this cost pool using a more cost causative allocator.

Account 6725 - Legal Expense

13. LT&T was required to apportion the "overhead" costs in this account in the same proportion as its directly assigned legal expenses are apportioned. LT&T did not

revise this account as directed and no explanation is given to justify such an omission. Consequently, we require LT&T to establish a cost pool for "overhead" costs and apportion these costs in the same proportion as its directly assigned legal expenses.

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that the December 19, 1988 revisions to LT&T's Cost Allocation Manual ARE APPROVED, subject to the conditions stated in this Order.

15. IT IS FURTHER ORDERED that the revisions required herein shall be submitted no later than **June 30, 1989.**

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Separation of costs of regulated telephone service from costs of nonregulated activities, *Report and Order*, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on reconsideration*, 2 FCC Rcd 6283 (1987) (*Order on Reconsideration*), *modified on further reconsideration*, 3 FCC Rcd 6701 (1988) (*Further Order on Reconsideration*), *petition for review pending*, Southwestern Bell Corp. v. FCC, D.C. Circuit No. 87-1764 (filed December 14, 1987).

[2] Lincoln Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 6160 (1988) (*LT&T Order*).

[3] *Id.* at 6160, paras. 2-3; *id.* at 6164 and 6165, paras. 37-38.

[4] LT&T Revised Manual, Cover Letter and Summary of Amendments, dated December 19, 1988.

[5] NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 5976 (1988) (*NYNEX Compliance Order*).

[6] *Id.* at 5980, para. 20.

[7] *Id., quoting* 47 C.F.R. §32.27(d).

[8] U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd at 199, paras. 33-34 (1988) (*U S West Order*).

[9] *Id.* at 199, para. 33.

[10] LT&T Revised Manual at 8.4, 8.7, 8.9, 8.10, 8.13, 8.15, 8.17, 8.21, 8.26, 8.35, 8.38, and 8.39.

[11] *Id.* at 8.4.

[12] *Id.* at 8.26.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies

Plan for Comparably Efficient
Interconnection of
Electronic Data Interchange
Service

MEMORANDUM OPINION AND ORDER

Adopted: May 26, 1989; Released: June 9, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On January 30, 1989, pursuant to the requirements the Commission adopted in the *Computer III* proceeding,[1] the Bell Atlantic telephone companies[2] filed a Comparably Efficient Interconnection (CEI) plan (the Plan) for Electronic Data Interchange service (EDI) that will facilitate electronically communicated exchanges of formatted documents such as purchase orders, invoices, and acknowledgments.[3] No comments were filed on the Plan. *Computer III* requires a Bell Operating Company (BOC) that wishes to offer an enhanced service, or class of enhanced services, on an unseparated basis prior to implementation of a comprehensive Open Network Architecture Plan (ONA) to submit and obtain approval of a CEI plan for the specific services it proposes to offer. In this Order, we approve the Plan, subject to certain conditions.

II. THE PLAN

A. *Service Description*

2. Bell Atlantic proposes to provide electronic storage and standards translations of computer files to allow users in different industries to exchange documents that use different industry formats. It says that the typical EDI transaction is initiated when a sender uses computer software to format an electronic document, such as a purchase order, into a "transaction set" in a format that is standard within the sender's industry.[4] These formats, it says, have developed independently within different industries, so that there is no uniform transaction set standard that all industries follow.[5] The sender will transmit the electronic document through Bell Atlantic's basic network to one or more recipients' computers, with delivery being either instantaneous, delayed until a time specified by the sender, or delayed until each recipient retrieves it from storage.[6] Recipients may then respond through EDI transactions such as acknowledgments or invoices.[7]

B. *Proposed CEI Arrangements*

3. Bell Atlantic plans to offer EDI on an unseparated basis. Bell Atlantic states that all the basic services that will be used in providing EDI, which include local exchange access, analog private line, digital private line, and switched data transmission services, will be available in existing tariffs. Bell Atlantic proposes to charge itself the same tariffed rates as those charged other enhanced service providers (ESPs) for the basic services used in association with the EDI services described in the Plan. Bell Atlantic further states that its EDI service will connect with Bell Atlantic's basic service network through standard interfaces that will be equal in quality to those provided to unaffiliated customers.

C. *Other Nonstructural Safeguards*

4. Bell Atlantic states that its procedures for implementing the customer proprietary network information (CPNI) and nondiscrimination reporting requirements are described in its ONA plan.

III. DISCUSSION

5. We conditionally approve the Plan. We conclude that Bell Atlantic has complied with the CEI parameters described in the *Phase I Order*.[8] Bell Atlantic satisfies the CEI pricing requirements since all the basic services that Bell Atlantic will use to offer EDI will be available to all ESPs and end users through generally applicable tariffs.[9] Both Bell Atlantic's enhanced service operations and its competitors will have access to the same basic services at the same rates and on the same terms and conditions.

6. We also approve the CPNI part of the Plan, subject to the following condition. The *BOC ONA Order* [10] discusses in detail a number of CPNI issues, and requires all the BOCs to amend their ONA plans to conform to these requirements. When Bell Atlantic's ONA amendments for CPNI become effective, Bell Atlantic must implement those amendments for its EDI services as well as its other enhanced services. In the interim period until such amendments for CPNI are approved and implemented, Bell Atlantic may follow the CPNI procedures proposed in its CEI plan.

7. The *BOC ONA Order* also addresses nondiscrimination reporting issues and requires several revisions to the reporting formats that Bell Atlantic and the other BOCs propose.[11] As a condition of Plan approval, once Bell Atlantic's amendments become effective, Bell Atlantic must incorporate these amendments into this CEI plan. As an interim measure, Bell Atlantic may submit reports in the format proposed in the Plan. Finally, we note that Bell Atlantic remains subject to the Commission's network information disclosure requirement, although the current Plan does not propose any changes to existing network interfaces. We approve this part of the Plan subject to the condition that Bell Atlantic comply with this requirement if any new network interfaces are necessary in the future.

IV. ORDERING CLAUSES

8. IT IS HEREBY ORDERED, that pursuant to Sections 1, 4(i) and (j), 201, 202, 203, 205, and 218 of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i) and (j), 201, 202, 203, 205, and 218, and 5

U.S.C. §553, Bell Atlantic's CEI Plan for Electronic Data Interchange service IS APPROVED, subject to the conditions described herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration pending, appeals pending sub nom. California v. FCC*, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1987) and *sub nom. Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also Report and Order*, 2 FCC Rcd 3072 (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration*), *further reconsideration pending*, (pet. for rev. filed Apr. 20, 1988), *California v. FCC*, No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988) and *Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988).

[2] The Bell Telephone Company of Pennsylvania, the four Chesapeake and Potomac Telephone Companies, the Diamond State Telephone Company, and New Jersey Bell Telephone Company (Bell Atlantic).

[3] Plan at 1.

[4] Plan at 2.

[5] *Id.* at 2 n. 3. Bell Atlantic says that there are three major EDI standards currently in use, with several subsets that are unique to particular industries. For example, it says, the Transportation Data Coordinating Committee has developed a standard with different subsets for ocean, air, rail and motor carriers, while the American National Standards Institute has developed a standard with subsets for the chemical, automotive, electrical, and metals industries. *Id.* at 3-4.

[6] *Id.* at 2.

[7] *Id.*

[8] *Phase I Order*, 104 FCC 2d at 1039-1043.

[9] Plan at 5-6.

[10] Filing and Review of Open Network Architecture Plans, CC Docket 88-2, Phase I, *Memorandum Opinion and Order*, 4 FCC Rcd 1 (1989), *appeal pending sub nom. Pacific Bell and Nevada Bell v. FCC*, No. 89-1194 (D.C. Cir. filed Mar. 20, 1989).

[11] *BOC ONA Order* at paras. 467-431, 481-488.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 26, 1989

Released: June 9, 1989

Re: WKXT-TV
Knoxville, Tennessee

KNOXVILLE CHANNEL 8 LIMITED PARTNERSHIP
SOUTH CENTRAL COMMUNICATIONS CORPORATION
c/o Edward S. O'Neill, Esquire
Bryan, Cave, McPheeters & McRoberts
1015 Fifteenth Street, N.W., Suite 1000
Washington, D.C. 20005

BPCT-810615KG

Gentlemen:

This refers to the request of Knoxville Channel 8 Limited Partnership (Knoxville Partnership), permittee of station WKXT-TV, channel 8, Knoxville, Tennessee, and South Central Communications Corporation (SCCC) for an 18-month waiver of Section 73.3555(b)(2) of the Commission's Rules relative to the WEZK(FM) divestiture condition contained in the *Order* awarding the construction permit for WKXT-TV to Knoxville Partnership. Section 73.3555(b)(2) prohibits cross ownership of a television station and an FM broadcast station located in the same community.

By way of background, the hearing proceeding for a new television station on channel 8, Knoxville, Tennessee, commenced in 1982 with ten competing applicants, including SCCC. SCCC, the licensee of station WTVK-TV, channel 26, in Knoxville, sought to modify its license to operate on channel 8. SCCC is also the licensee of WEZK(FM), Knoxville, Tennessee. The hearing order designating the mutually exclusive applications for hearing contained a condition requiring SCCC, in the event it was the successful applicant, to divest itself of all interest in, and connection with, WEZK(FM) prior to the commencement of operation of the television station. By *Order* released October 4, 1988 (FCC 88I-097), the Adjudication Division of the Office of the General Counsel, pursuant to delegated authority, approved a settlement agreement among the applicants and granted the construction permit to Knoxville Partnership. Knoxville Partnership is a newly formed entity comprised of two of the prior applicants, Tennessee Telecorp, Inc. (TTI) and SCCC, and their respective principals. TTI and SCCC are limited partners holding 69% and 25% equity interests, respectively. John D. Engelbrect, SCCC's principal owner, and the five principals of TTI are all general partners, each holding a one percent equity interest in the partnership. Knoxville Partnership has been assigned the call letters WKXT-TV. The Office of the General Counsel granted Knoxville Partnership's construction permit subject to the same divestiture condition that had been imposed on any grant to SCCC.[1]

You have requested a temporary 18-month waiver of Section 73.3555(b)(2) relative to the divestiture condition. In support of your request, you state that SCCC's involvement in the prosecution of its application for channel 8 and its efforts to effect a settlement of the related comparative proceeding precluded it from any meaningful efforts to dispose of WEZK(FM). You assert that the 18-month period is necessary in order to allow an orderly divestiture of WEZK(FM) without the threat of a "forced sale." A forced sale, you argue, will render the disposition of WEZK(FM) more difficult. You note that a grant of your request will not create any new cross ownership in Knoxville, but would merely postpone the divestiture of WEZK(FM). In that connection, you state that SCCC has operated WTVK-TV (channel 26) and WEZK(FM) for over 20 years in Knoxville pursuant to its grandfathered status under the provisions of the multiple ownership rules. Here, you point out, Knoxville Partnership will operate WKXT-TV from the physical facilities of WTVK-TV, as appropriately modified, and the license of station WTVK-TV will be returned to the Commission for cancellation. You also indicate that SCCC, a closely held family corporation, has operated WTVK-TV and WEZK(FM) at all times with totally independent and autonomous staffs, and that such separation will continue during the requested 18-month period. You also argue that this separation will be enhanced by SCCC's limited partnership role in the new television partnership permittee and by Mr. Engelbrecht's limited role as only one of six general partners in the television permittee. Thus, you conclude, there will be no adverse impact on diversity in Knoxville.

You also assert that the Commission in the past has considered the existence of co-ownership pursuant to the grandfather provisions in evaluating requests for temporary waiver of the multiple ownership rules. *See, e.g., Taft Broadcasting Co.*, 2 FCC Rcd 6622 (1987), and *Capital Cities Communications, Inc.*, 2 FCC Rcd 2539 (1987) (*Capital Cities*). In *Capital Cities*, you note, the Commission stated that a temporary waiver had the effect of maintaining a grandfathered combination, not the creation of a new prohibited combination. You claim that a grant of your waiver request would not create a "new" cross ownership situation and would also facilitate the achievement of the principal purpose of the Knoxville settlement; *i.e.*, the provision to that community of a new VHF service at the earliest possible time.

In addition, you maintain that no undue concentration of the media would result if the temporary waiver request is approved because the Knoxville market, which is ranked as the 61st largest television market and the 67th largest radio market, is served by an overabundance of diversely owned traditional broadcast and alternative media services. In addition to WKXT-TV, the market is served by five television stations (WATE-TV, channel 6 (ABC), Knoxville; WBIR-TV, channel 10 (NBC), Knoxville; WSJK-TV, channel 2 (ETV), Sneedville; WINT-TV, channel 20 (IND), Crossville; and WKCH-TV, channel 43 (IND), Knoxville, all Tennessee), 19 radio stations, two daily newspapers, and two low power television stations. You note further that the Commission has granted three

licenses for multipoint distribution systems and one license and one construction permit for multichannel multipoint distribution systems to serve Knoxville.

We note that SCCC has owned and operated the WEZK(FM)/WTVK-TV radio/television combination in Knoxville for many years pursuant to its grandfathered status under the multiple-ownership rules. SCCC chose to exchange its controlling interest in UHF station WTVK for an attributable interest in a new entity to operate VHF station WKXT-TV. Therefore, its common ownership interests in the radio and television stations are no longer grandfathered and are now inconsistent with our multiple ownership rules. Thus, you requested a temporary waiver of Section 73.3555(b)(2) of the Commission's Rules in order to divest WEZK(FM). Based on the above representations, we believe that a temporary waiver of Section 73.3555(b)(2) is consistent with Commission precedent and will serve the public interest.

Further, in view of the numerous other media services available, we find that no undue concentration of control of the media will result from a grant of this temporary request. SCCC has operated WTVK-TV and WEZK(FM) as the 100% owner for over two decades in Knoxville, and we do not believe that SCCC's or Mr. Engelbrecht's more limited role in the operation of WKXT-TV and WEZK(FM) during the waiver period will have a significant adverse effect on the public interest. Forcing an immediate sale of WEZK(FM) will not be in the public interest because it would artificially limit the range of potential buyers to those with immediate access to the necessary capital. Such a forced sale could work an economic hardship on SCCC without significant offsetting public interest benefits. *See Metromedia Radio & TV*, 102 FCC2d 1334 (1985), *recon. denied*, 59 RR 2d 1211 (1986). Thus, we find that an 18-month period, from the date of this Order, is appropriate to effectuate the orderly disposition of WEZK(FM).

Accordingly, your request for a temporary waiver of Section 73.3555(b)(2) of the Commission's multiple ownership rules to permit SCCC to hold cognizable ownership interests in WKXT-TV and WEZK(FM), both Knoxville, Tennessee, for a period of 18 months IS GRANTED, subject to the conditions that South Central Communications Corporation shall divest itself of all interest in, and connection with, WEZK(FM), no later than 18 months from the release date of this Order.[2]

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Pursuant to special temporary authority granted by the staff on December 5, 1988, to Knoxville Partnership, VHF station WKXT-TV began program test operation utilizing the physical facilities of UHF station WTVK-TV, which then went silent. The license for station WTVK-TV was subsequently cancelled by the staff.

[2] We note that nothing in our recent decision amending the one-to-a-market rule modified our standards for temporary waivers for the purpose of divestiture. *See Amendment of Section 73.3555 of the Commission's Rules*, FCC 88-407, released February 23, 1989. We will continue to apply our existing precedent regarding temporary waivers.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CALOOSA TELEVISION CORPORATION — File No. BPCT-860702KG

For Modification of Facilities of
Station WEVU(TV), Naples, Florida

MEMORANDUM OPINION AND ORDER

Adopted: May 26, 1989; Released: June 9, 1989

By the Commission: Commissioner Quello concurring in the result.

1. The Commission has before it for consideration: (a) its April 28, 1988, action granting the above-captioned application of Caloosa Television Corporation (Caloosa) for modification of the facilities of licensed Station WEVU(TV) (Channel 26, ABC), Naples, Florida, *Caloosa Television Corporation*, 3 FCC Rcd 3656 (1988); and (b) a petition for reconsideration of that action, filed by the Association of Maximum Service Telecasters (AMST).[1]

2. Caloosa currently operates Station WEVU(TV) from a site in Bonita Springs, Florida, with a tower 710 feet above average terrain (HAAT) and with an effective radiated visual power (ERP) of 2750 kW. The station's existing site meets all Commission spacing requirements. In order to become more competitive with other stations in the area, and since it is unable to increase the height of its present tower due to Federal Aviation Administration (FAA) limitations, Caloosa proposed to move its transmitter to a site 5.5 miles southwest of Corkscrew, Florida. It also proposed to increase the height of its tower to 1205 feet HAAT and to increase its ERP to 5000 kW. The site is 317.5 kilometers (197.3 miles) from the site of unbuilt co-channel Station WAYQ(TV), Daytona Beach, Florida. Since Section 73.610(b) of the Commission's Rules requires a minimum separation of 329.0 kilometers (204.5 miles) between co-channel UHF stations located in Zone 1, Caloosa's proposed site would be 11.5 kilometers (7.1 miles) short-spaced, and Caloosa sought waiver of the Rule.

3. In granting Caloosa's proposal, we first restated the public interest factors we have evaluated in the past in considering waiver requests of our minimum spacing requirements.[2] Departing from precedent, we also stated that we would consider whatever technical proposal an applicant might make to reduce or eliminate objectionable interference. We reaffirmed our intent generally to require applicants proposing short-spaced sites first to make a threshold showing that suitable fully spaced or less short-spaced sites are unavailable. In the case of an existing station, the applicant must continue to show that its present site is no longer suitable. Even though Caloosa did not make the threshold showing traditionally required, we nevertheless granted its application on the basis of an unusual combination of public interest reasons present here. Specifically, we noted that other network affiliates in the market operate from taller towers that are more centrally located than Caloosa. As a result, Station WEVU(TV) reaches 40 percent fewer television households than these competitors and is, therefore, at an economic disadvantage. Caloosa's present site is located in an area where towers cannot exceed the present HAAT of 710 feet because of FAA restrictions. In seeking a new site, we found that Caloosa was severely limited by the proximity of the Gulf of Mexico and extensive swamp areas and by the fact that local authorities and the FAA have encouraged development of just three areas for the location of tall towers. Caloosa's proposed site is the least short-spaced of those locations from which a tall tower could be utilized. Additionally, we found that operation from the proposed site would create a gain area encompassing more than 60,000 persons and would provide a first off-the-air ABC network service to more than 34,000 persons. Moreover, these gains would not come at the expense of others, since no loss area would be created. We further noted that, while the amount of short-spacing here would not be minimal, it would, nevertheless, be within the range of others that had been approved. Moreover, the permittee of Station WAYQ(TV), the only station to which objectionable interference would be theoretically caused, does not object to the proposal now that Caloosa has agreed to install and operate precision frequency control equipment so as to preclude such interference. Finally, we also determined that, while the tower would be built in a flyway for wood storks and other threatened birds, the United States Fish and Wildlife Service reviewed Caloosa's proposal and gave its approval subject to certain conditions. We concluded that the slight environmental disadvantage of locating at the proposed site would be outweighed by all of the other factors expressed above when considered cumulatively. Accordingly, we granted Caloosa's waiver request and its application, subject to conditions. AMST's petition for reconsideration followed on July 13, 1988.

4. In support of its petition, AMST argues that our action in this matter relaxes the standards by which we consider applications proposing short-spaced sites and that these changes would lead to "damaging increases in interference that could lead to the 'AM-ization' of television." AMST contends that it has long been Commission policy to require applicants proposing to move to a short-spaced site to show that their current sites are no longer available. By allowing Caloosa to demonstrate an "unusual combination of public interest factors," AMST maintains that we have eroded that policy and have made it more difficult to enforce in the future. While AMST admits that a substantial expansion of service by an existing station coupled with no service losses may justify exceptions in some cases, it argues that unsupported claims of competitive disadvantage are not sufficient. AMST also opposes our determination that technical means for reducing or eliminating objectionable interference should be a public interest factor to be evaluated in considering waiver requests. It notes that, in the past, we have not considered such technical means to be an independent justification for a waiver but, rather, as a condition to be imposed on the construction permit after a waiver has been justified by other considerations. AMST contends our new approach would leave open the possibility that waivers will be granted when the applicant proposes only to reduce -- not eliminate -- the objectionable interference, thereby

further weakening the enforcement of our minimum spacing requirements. Consequently, AMST urges us to reexamine the policy implications of our previous action and adopt a rationale that is "more consistent with prior precedent and the public's interest in interference-free service."

5. While we are not persuaded to alter our initial decision in this matter, we understand and concur in AMST's underlying concern for the integrity of our channel allotment process. Our minimum spacing requirements are the key to a coherent television policy based on that process. Inasmuch as indiscriminate departures from those requirements could lead to widespread objectionable interference, such actions would be contrary to the public interest. The facts in this case indicate that a modest departure from the minimum spacing rules, with a requirement for precision frequency control, would reap substantial public interest benefits with no concomitant cost. While our April 28 action did modify somewhat our policy with respect to short-spacings, we nevertheless stated that "[w]e do not propose to abandon generally the requirement that licensees operating from fully spaced sites make the threshold showing of the unsuitability of its existing site or other fully spaced sites . . . when they seek a waiver of our spacing requirements." We reaffirm that standard. At the same time, however, we cannot ignore the unusual combination of public interest factors set out above, and, in appropriate situations, we will look beyond the bare threshold showing normally required. Our decision to do so, however, should not be misconstrued as a lessening of our commitment to a high quality technical television service. Thus, AMST and the public need not be concerned that our policy will result in significant increases in interference. The only other change to our short-spacing policy -- and that a minor one -- is that we will now consider whatever technical proposal an applicant might make to reduce or eliminate objectionable interference. Such consideration, however, would be only one of several public interest factors we would evaluate. We believe that this change gives us the added flexibility to consider effective efforts on the part of the applicant to minimize or eliminate any objectionable interference it might cause.

6. Accordingly, for the reasons stated above, the petition for reconsideration filed by AMST IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] AMST asserts standing to file its petition for reconsideration notwithstanding its failure to participate in the underlying application proceeding, because it had "good reason", as required by Section 1.106(b)(1) of the Commission's Rules, not to participate earlier. Specifically, AMST contends that "at the time Caloosa's application was filed, [the Commission's] general counsel's interpretation of the *ex parte* rules (no longer in effect) prevented MST from commenting on both individual short-spacing waivers and Rule Making proceedings of broader application concerning similar issues." By letter, however, dated November 26, 1986, the Commission's general counsel expressly advised counsel for AMST that "AMST's participation in individual cases would not be a bar to otherwise permissible ex parte contacts in the generic Rule Making, so long as such communications do not include discussions of the specific merits of individual waiver cases." Because an informal objection -- the only form of opposition which lies against a minor modification application such as Caloosa's -- may be filed at any time before Commission action on the application (*see* 47 CFR §73.3587) and the Commission's decision granting Caloosa'a application was not adopted until April 28, 1988, AMST had more than ample time to make known its concerns during the initial stage of this proceeding. We find, therefore, that AMST has not shown "good reason" for its untimely intercession in this case. We have elected, nonetheless, to consider the merits of AMST's petition in order to assure ourselves of the fullest range of information and argument potentially relevant to our decision.

[2] Those factors include: (1) the unsuitability of the existing site, either in terms of the economic viability of the station, in technical terms, or in a licensee's inability to reach areas containing a significant number of viewers who lack service, a network service, or "independent" service; (2) the magnitude of the short-spacing; (3) the nature and extent of any predicted loss of service that would result from a grant of the short-spacing; (4) the aeronatuical and environmental benefits and drawbacks of locating a tower in a particular area; (5) the concerns, if any, expressed by the licensee(s) to which short-spacing would result; and (6) the extent to which the licensee obtained its license knowing there were spacing restraints imposed in a rule making proceeeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of:

STEVEN B. COURTS File No. BPH-870313MT

For a Construction Permit
for a New FM Station on Channel 274A
in La Crescent, Minnesota

MEMORANDUM OPINION AND ORDER

Adopted: May 26, 1989; Released: June 9, 1989

By the Commission:

1. The Commission has before it for consideration a "petition for rehearing" filed May 23, 1988, on behalf of Steven B. Courts, ("Courts"). Pursuant to 47 C.F.R. §1.115, Courts' pleading will be considered as a timely application for review of the Mass Media Bureau's ("Bureau") action in the *Hearing Designation Order* ("Order") denying Courts' petition for reconsideration and dismissing his application for a new FM station in La Crescent, Minnesota. *See La Crescent Community Broadcasters*, 3 FCC Rcd 2332 (M.M. Bur. 1988). A timely opposition to Courts' pleading was filed on June 7, 1988, by Gwendolyn M. Gutzel ("Gutzel"), a party to the La Crescent, Minnesota proceeding.[1]

2. *Background*. Courts submitted his application for the La Crescent, Minnesota allocation on March 13, 1987. On April 10, 1987, the application was accepted for tender, triggering a 30 day period for Courts to file amendments affecting the acceptability or grantability of its application, including amendments pertaining to the location of its transmitter site. Courts did not file any amendments. Thereafter, Courts' application was reviewed for acceptability. Staff review revealed that the geographic coordinates for the proposed transmitter site listed in Sections V-B and V-G of Courts' application conflicted with the coordinates for the site as plotted on the site map. Therefore, the application was returned as unacceptable for filing by the Chief, FM Branch on September 24, 1987. The Bureau's letter returning Courts' application explained that the geographic coordinates, to the nearest second, of the proposed transmitter site are critical to processing the application. The Bureau pointed out that if the staff is unable to determine the location of the proposed transmitter because of a discrepancy between the location of the site as listed in the application and as plotted on the geographic site map, the staff cannot evaluate, *inter alia*, the site availability certification or the information supplied for FAA approval.[2] The discrepancy in Courts' site coordinates therefore made it impossible to determine, from the face of the application, whether Courts' proposal complied with Commission acceptability criteria. Courts petitioned for reconsideration of the return of his application on November 2, 1987. Courts argued in his petition that the discrepancy between the geographic coordinates of his proposed transmitter site did not affect the acceptability of his proposal. In support of this contention, Courts made several arguments: that, to the extent the Commission's treatment of pre-designation and post-designation amendments is disparate, the processing standards are arbitrary and capricious; that the Commission's action with respect to Courts' proposal was arbitrary and capricious in light of the Commission having accepted for filing the applications of others similarly situated; and that the return of the subject application was erroneous because the discrepancy could be resolved confidently and reliably, drawing on the application as a whole. Courts' petition for reconsideration was denied in the *Order* designating for hearing the four remaining mutually exclusive applications for FM service to La Crescent, Minnesota. *La Crescent Community Broadcasters*, 3 FCC Rcd at 2333.

3. In the *Order*, the basis for denial was Courts' failure to demonstrate that the staff erred in concluding that the site location could not be verified under existing precedent and procedures. Specifically, the Bureau rejected Courts' argument that present Commission processing standards are arbitrary and capricious. The Bureau found that the cases cited by Courts in support of this argument were inapposite because they pertained to processing standards in effect prior to the adoption of the "hard look" procedures instituted by the Commission in its *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19,936 (May 13, 1985). Moreover, the Bureau held that Courts failed to demonstrate that the discrepancy could be resolved confidently and reliably from the face of the application through the use of a nine point formula devised by Courts. *See La Crescent Community Broadcasters*, 3 FCC Rcd at 2333 for a full description of the nine point formula. The Bureau noted that the staff's use of Courts' formula failed to produce a single reliable set of coordinates; therefore, the staff could not determine from the face of the application whether Courts intended the plotted site or the site as listed in the application for his proposed transmitter. Finally, the Bureau rejected Courts' argument that the Commission has accepted for filing other applications which contained similar transmitter site discrepancies. The Bureau distinguished the cases cited by Courts, pointing out that the applicants in those proceedings either proposed to side mount their antennas on the tower of an existing licensee and referenced the licensed facility in the application itself or the applicants supplied data in the application from which the coordinate discrepancy could be confidently and reliably resolved. *See e.g., A. B. C. D. Broadcasting Company*, 2 FCC Rcd 6551 (M.M. Bur. 1987); *Addison Broadcasting Company, Inc.*, 2 FCC Rcd 6358 (M.M. Bur. 1987). Accordingly, the Bureau found that Courts failed to demonstrate, pursuant to 47 C.F.R. § 1.106, that the staff's return of his application was erroneous.[3] Consequently, Court's petition for reconsideration was denied and his application was dismissed. Courts filed the subject application for review of the Bureau's action on May 23, 1988.

4. *The Application for Review*. Courts advances arguments made in his petition for reconsideration, and contends that the Bureau failed to support with adequate reasoning the determination that his application was unacceptable for filing. First, Courts asserts that the Bureau failed to follow current processing guidelines for FM applications in order to determine whether the discrepancy in his application could be resolved with a high degree of confidence. Second, Courts argues that the

discrepancy did not render his application unacceptable or otherwise prevent the staff from determining whether his proposal complied with Commission rules. Finally, Courts again argues that Commission processing of FM applications is arbitrary: the proposals of other similarly situated applicants have been found to be acceptable, and those applicants permitted to amend to cure the discrepancies; and the Commission has offered no rational explanation for its practice of ordering an amendment to cure an acceptability defect when the discrepancy is discovered post-designation while disallowing such a curative amendment and returning the application when the discrepancy is discovered prior to designation of the mutually exclusive applications for hearing. Courts also contends that his application does not frustrate the stated objectives of the "hard look" processing standards set out in the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19,936 (May 13, 1985). Courts therefore concludes that the return of his application was arbitrary, capricious, an abuse of administrative discretion and that his application must be reinstated *nunc pro tunc* and consolidated for hearing with the other mutually exclusive applications for new FM service in La Crescent, Minnesota.

5. *The Opposition*. Gutzel responds that Courts' contentions are with-out merit. Gutzel emphasizes that none of Courts' arguments remedy the defective character of his application, which on its face specifies two transmitter sites, each described by a discrete set of geographic coordinates. Gutzel also asserts that Courts' nine point formula is self-serving and cannot be derived from information found within his application. Gutzel argues that use of the formula does not lead to the conclusion, with the requisite degree of confidence, that the site Courts intended is correctly plotted on the transmitter site map but inaccurately listed throughout the rest of the application. Gutzel states that the Commission has uniformly dismissed applicants who, like Courts, proposed conflicting geographic coordinates for the location of a transmitter which was not to be mounted on an existing tower.

6. *Discussion*. Courts first contends that the staff failed to determine whether the discrepancy in the location of his transmitter site could be confidently and reliably resolved, as required by Appendix D of the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. at 19,946. Specifically, Courts argues that the discrepancy may be resolved with the requisite degree of confidence based on a nine point formula which he devised, the application of which purportedly demonstrates that the geographic coordinates plotted on the site map accurately depict the location intended for the transmitter. *See La Crescent Community Broadcasters*, 3 FCC Rcd at 2333. Courts, in his petition for reconsideration, also advanced this formula as a method for resolving the discrepancy, but asserts in the subject pleading that the Bureau failed to offer adequate reasoning to support its conclusion that use of the formula failed to produce a resolution of the discrepancy with the requisite degree of confidence.

7. Under the "hard look" rationale enunciated in the *Report and Order* in MM Docket No. 84-750, an accurate showing of the geographic coordinates is necessary to an acceptability determination. *See* 50 Fed. Reg. at 19,945; *Richard P. Bott, II*, 3 FCC Rcd 6063 (1988). *See also Star Signal Corp.*, 1 FCC Rcd 450 (1986). While Courts has provided geographic coordinates for his proposed transmitter site, the *Report and Order* in Docket No. 84-750 further states in Appendix D that if "on the face of the application [the coordinates are] visibly incorrect or inconsistent," and the discrepancy cannot be resolved "within the confines of the application and with a high degree of confidence, the presence of the clearly void data will be treated as functionally equivalent to the absence of such data." 50 Fed. Reg. at 19,946.

8. Courts argues that the staff should have confidently concluded, through use of his nine point formula, that the location of the transmitter was correctly depicted on the topographic site map because the elevation of the site as plotted on the map corresponded to the site elevation specified throughout the rest of the application. However, in order to reach this conclusion, it would have been necessary for the staff to assume in the first instance that the plotted site was the correct one and that the elevation of the site at the coordinates plotted on the map was indeed the correct elevation. It is equally reasonable to assume that Courts intended the site depicted by the geographic coordinates listed in Sections V-B and V-G of the application, and had specified the wrong site elevation throughout the rest of the application based on information derived from the inaccurately plotted site.[4]

9. Courts failed to amend his application to cure the discrepancy during the 30 day period following public notice that his application was accepted for tender. Because there were unresolved discrepancies in the geographic coordinates for Courts' proposed transmitter site, his application was "patently not in accordance with the ... requirements" of Appendix D and therefore was unacceptable. 47 C.F.R. § 73.3566(a). *See also Richard P. Bott, II*, 3 FCC Rcd 6063; 47 C.F.R. § 73.3522(a)(6).

10. Contrary to Courts' assertion, the staff did attempt to resolve the discrepancy in his application, but concluded that use of Courts' formula failed to produce a single reliable set of coordinates and that nothing else in the application established clearly that one set of coordinates should be favored over the other.[5] The resulting ambiguity made it impossible for the staff to determine whether Courts intended the site as plotted or the site as listed in the application. *La Crescent Community Broadcasters*, 2 FCC Rcd at 2333.

11. Next, we will address Courts' assertion that the present Commission standards for processing FM applications, as set out in the *Report and Order* in MM Docket No. 84-750, *supra*, are arbitrary. First, Courts cites *Melody Music Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965), for the proposition that dismissal of his application amounts to patently unfair disparate treatment in that the staff has resolved similar discrepancies in other applications and allowed amendment of those applications. Courts cites several Bureau *Hearing Designation Orders* in support of this argument. In the first group of cases cited by Courts, applicants proposing to side mount their antennas on existing towers licensed by the Commission had discrepancies either in the geographic coordinates for the transmitter sites or in the heights specified for the existing towers. *See La Crescent Community Broadcasters*, 3 FCC Rcd at 2333; *Carta Corporation*, 3 FCC Rcd at 799; *Addison Broadcasting Company, Inc.*, 2 FCC Rcd at 6358; *PN Radio Company*, 2 FCC Rcd 5540, 5543 (M.M. Bur. 1987). With respect to applicants in these proceedings, Courts argues that the staff violated the processing standards set out in Appendix D by going beyond the confines of the applications in question in order to resolve the discrepancies in the applications, which amounts to ar-

bitrary and capricious abuse of Commission processing rules. Courts concludes that he should not be treated differently merely because he failed to propose to side mount his antenna on an existing tower licensed by the Commission.

12. Contrary to Courts' assertions, the staff did not violate Appendix D's processing guidelines by resolving discrepancies in the applications cited with information which could not be derived from the applications in question. In each instance, the applicant identified the licensed tower upon which it proposed to locate an antenna, thereby incorporating by reference the engineering data contained in the licensed facilities' application on file with the Commission and enabling the staff to verify the proper coordinates. Because the applicants cited clearly proposed to locate their antennas on existing towers to which specific reference was made in each application, the staff could, drawing on the applications as a whole and on Commission records for the licensed facilities, confidently and reliably verify the transmitter locations or heights in order to complete an acceptability study which verified each proposal's compliance with Commission rules. In particular, using the accepted coordinates for the existing towers, the staff could verify the exact locations of the proposed transmitter sites. Therefore, amendment of those applications was not essential to the processing of those applications for acceptability purposes. In the present case, however, the staff could not complete an acceptability study because it was not possible to derive essential information confidently from Courts' application and Commission records, *viz.*, which set of geographic coordinates accurately described Courts' proposed transmitter site. Further, the Commission has rejected the argument that applicants such as Courts whose proposals contain site coordinate discrepancies are similarly situated with applicants whose proposals contain site coordinate discrepancies which may be resolved because the application references an existing licensed tower as the intended transmitter site. *See Nicholasville Broadcasting Company*, FCC 89-88, adopted March 14, 1989. Therefore, Courts and the applicants in the proceedings cited are not similarly situated.

13. Courts also cites cases in which applications specifying inconsistent heights for the proposed antennas have been found acceptable, despite the Commission's explicit statement in Appendix D that these antenna heights "are interrelated and must be specified consistently, as is the case with all other crucial engineering parameters." 50 Fed. Reg. at 19,946. Courts contends that in those cases the staff has either resolved the inconsistency based on the application as a whole or has arbitrarily determined that the discrepancy does not affect the acceptability of the application. We reject Courts' argument that the cited applications were improperly found to be acceptable. Moreover, Courts and the applicants cited are not similarly situated. *Rockledge Community Broadcasters, Inc.*, 3 FCC Rcd 688 (M.M. Bur. 1988); *A. B. C. D. Broadcasting Company*, 2 FCC Rcd 6551 (M.M. Bur. 1987); and *LNJ Communications*, 2 FCC Rcd 6072 (M.M. Bur. 1987).

14. In both *Rockledge Community Broadcasters, Inc.*, 3 FCC Rcd at 688, and *LNJ Communications*, 2 FCC Rcd at 6074, applicants *consistently* listed values for the height of the antenna radiation center above aver age terrain (HAAT) throughout their applications. In each case, however, amendment was required because in the normal course of processing, an independent staff evaluation of the applications revealed that the values specified were different than those derived through calculations using other data contained in the applications. The staff study in each case demonstrated that the discrepancy did not affect the applicants' compliance with Commission rules because the staff could readily ascertain, without additional extensive study, that, using either value, the proposals complied with power and antenna height acceptability requirements set out at 47 C.F.R. § 73.211. Therefore, these applications did not contain discrepancies which prevented the staff from completing an acceptability study, as was the case with Courts' application. In *A. B. C. D. Broadcasting Company*, 2 FCC Rcd at 6552, an applicant listed a different height for the antenna radiation center above ground level in its application than was portrayed in the tower sketch. However, consistent with Appendix D, the staff was able to derive the correct height confidently and reliably, using the consistent value for the height of the radiation center above mean sea level which was correctly stated throughout the application. Having thus resolved the discrepancy, the staff was able to complete an acceptability study and to determine that the application was in compliance with Commission rules. As discussed above, such a confident and reliable resolution of the discrepancy in Courts' application was impossible.

15. Further, the Bureau has consistently dismissed applicants whose proposals contained conflicting geographic coordinates for the location of a transmitter site which was not proposed to be side mounted on an existing tower. *See, e.g., Lawrence L. Bush, Jr.*, 3 FCC Rcd 4771 (M.M. Bur. 1988); *Ocean Waves Broadcasting*, 3 FCC Rcd 4637 (M.M. Bur. 1988); *Rayne Broadcasting Company, Inc.*, 2 FCC Rcd 7552 (M.M. Bur. 1987); *PN Radio Company*, 2 FCC Rcd 7358 (M.M. Bur. 1987); *William M. Piner*, 2 FCC Rcd 7095 (M.M. Bur. 1987); *Nevada Number One Radio Co.*, 2 FCC Rcd 6668 (M.M. Bur. 1987); *SEB Broadcasting Inc.*, 2 FCC Rcd 6401 (M.M. Bur. 1987); *PN Radio Company*, 2 FCC Rcd 4045 (M.M. Bur. 1987); *Meridian Communications*, 2 FCC Rcd 3630 (M.M. Bur. 1987). The Commission has recently affirmed this practice, upholding the Bureau's dismissal of applications containing inconsistent geographic coordinates for the proposed transmitter site. *See Nicholasville Broadcasting Company*, FCC 88-89, adopted March 14, 1989; *Richard P. Bott, II*, 3 FCC Rcd 6063; *Nan E. Carlisle & Jitendra R. Patel*, 3 FCC Rcd 2530 (1988). Although Courts cites *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965), for the proposition that dismissal of its application amounts to patently unfair disparate treatment, it is clear that Courts has not been treated differently than other applicants whose proposals contained similar deficiencies. Therefore, Courts' argument that Commission processing standards are arbitrary is without merit. *See New Orleans Channel 20, Inc.*, 830 F.2d 361, 366 (D.C. Cir. 1987).

16. In the second part of his argument, Courts also asserts that Commission processing standards for FM applications are arbitrary because different standards govern pre-designation amendments and post-designation amendments. Therefore, Courts asserts that if the discrepancy in his application had been discovered after designation for hearing of the mutually exclusive applications, Courts would have been allowed to submit a clarifying amendment to the Administrative Law Judge as a matter of course. This disparity in standards, Courts argues, constitutes an abuse of administrative discretion. Moreover, Courts argues that the Bureau's treatment of this ar-

gument in the *Order* was inadequate. We reject Courts' contentions. Courts assumes that if the discrepancy in his application had been discovered after Bureau processing was complete, the Administrative Law Judge would have, as a matter of course, accepted the amendment under the good cause standards set out at 47 C.F.R. § 73.3522(b), which govern post-designation amendments. But even if this were the case, the fact that different standards apply to amendment of an application under different periods of the administrative decision making process is not arbitrary and capricious as long as similarly situated applicants are treated in the same manner at each phase in the decision making process. *See New Orleans Channel 20, Inc. v. FCC*, 830 F.2d at 366 (*"Melody Music* and its progeny appropriately recognize the importance of treating parties alike when they participate in the same event ... ") As discussed above, Courts has not been subject to any disparate treatment. Therefore, Courts' argument that Commission rules with respect to pre and post-designation amendment of FM applications are arbitrary is without merit.

17. Finally, Courts argues that his application was acceptable for filing notwithstanding the discrepancy. Specifically, Courts asserts that the discrepancy did not affect the staff's ability to determine whether his proposal complied with Commission rules. Courts attempts to demonstrate that the discrepancy in the location of his proposed transmitter site did not affect the validity of the site certification, the environmental statement, or notice given to the FAA. Further, Courts asserts that his proposal complies with the coverage requirements of 47 C.F.R. § 73.315 because the site, both as plotted on the map and as listed in the application itself, would provide the requisite 70 dBu field strength over the entire principal community to be served. Courts also contends that either transmitter site meets the minimum distance separation requirements set out at 47 C.F.R. § 73.207.

18. Courts' analysis demonstrating that the discrepancy did not affect the acceptability of his proposal requires, in effect, that Courts' application be treated as two separate proposals because the staff would have to evaluate the acceptability of the proposal using each transmitter site. The new "hard look" processing standards set out in the *Report and Order* in MM Docket No. 84-750, *supra*, were intended to streamline Commission procedures to make more efficient use of staff and other resources at a time when the Commission is experiencing a large influx of FM applications. *See Star Signal Corporation*, 1 FCC Rcd at 451 (1986); *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986); *Anchor Broadcasting Limited Partnership*, 2 FCC Rcd 7051 (MM Bur. 1987). The return of Courts' application as unacceptable for filing upon a determination that the inconsistency in his application could not be resolved with a high degree of confidence reflects the Commission's emphasis on providing service to the public in the most efficient, expeditious manner possible. *See Hillebrand Broadcasting, Inc.*, 1 FCC Rcd at 419. Requiring the staff to determine that the proposal, using either transmitter site, met Commission acceptability criteria would require that the staff act in direct derogation of the goals of the "hard look" procedures. *See Nan E. Carlisle*, 3 FCC Rcd at 2530; *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd at 419. Therefore, we reject Courts' argument that his proposal is acceptable notwithstanding the discrepancy as well as Courts' conclusion that his application does not frustrate the objectives of the Commission's FM processing procedures. Moreover, we note that processing Courts' proposal as two separate applications, each specifying a different transmitter site, would amount to prohibited disparate treatment of his application, not only as compared with the other applicants in this proceeding, but also as compared to similarly situated applicants in other proceedings whose applications have been returned as unacceptable for filing for unresolvable discrepancies in the location of their proposed transmitters. *See generally New Orleans Channel 20, Inc.*, 830 F.2d 361; *Melody Music, Inc.*, 345 F.2d 730; *Anchor Broadcasting Limited Partnership*, 2 FCC Rcd 7051.

19. Accordingly, for the foregoing reasons, IT IS ORDERED, that Courts' pleading, captioned as a petition for rehearing, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] On June 17, 1988, Courts filed a motion for an extension of time, to and including June 24, 1988, in which to reply to Gutzel's opposition. However, it was not until June 30, 1988, that Courts filed his reply. Pursuant to 47 C.F.R. § 1.115, Courts' reply was untimely. In his motion, Courts asserted that personal and professional commitments of his counsel necessitated that his reply be filed outside the period allowed by the rule. It is Commission policy that extensions of time will not be routinely granted. 47 C.F.R. § 1.46. The personal and professional commitments of Courts' counsel do not justify the filing of an untimely pleading. Accordingly, the extension of time will be denied. Furthermore, even if Court's motion were granted, his reply would still be untimely as it was filed after the extension date requested.

[2] Absence of this data also makes it impossible to determine the distance from the proposed site to other proposed or existing broadcast facilities and to the community of license. The geographic location also determines whether protection must be afforded to monitoring facilities and to radio quiet zones (*See* 47 C.F.R. § 73.1030), marks the center of the "blanketing" area (47 C.F.R. § 73.315) and is fundamental to an analysis of a proposal's environmental and electromagnetic effects on other, nearby communications facilities.

[3] The application was originally returned as unacceptable for filing. However, in the *Order*, the Bureau characterized the defect in Courts' application as a tenderability defect. This characterization was erroneous. Courts' application was properly returned by the staff as unacceptable for filing. When Courts' application was reviewed to determine whether it met tenderability criteria, the staff ascertained only that the geographic coordinates for the proposed transmitter site were consistently listed in the application and that the application was accompanied by a transmitter site map on which the location of the proposed transmitter site was marked. It is not until an application is reviewed for acceptability that the staff determines whether the geographic coordinates for the transmitter site listed in the application match the coordinates for the site plotted on the transmitter site map. When, as in Courts' case, a discrepancy is found which cannot be resolved with a high

degree of confidence, the staff returns the application as unacceptable for filing. *See* para. 7-10 *infra*. Nevertheless, characterization of the discrepancy in Courts' application as a tenderability defect or an acceptabilty defect does not affect the outcome of this case. Applicants may perfect the tenderability of their applications only by an amendment filed by the close of the pertinent filing window. *See Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19,936, 19,941 (May 13, 1985); *see also* 47 C.F.R. § 73.3522. Thereafter, applications which are found to be tenderable may be amended to correct acceptability defects during the 30 day period following public notice that the application was accepted for tender. *Id.* Courts failed to file a perfecting amendment during either amendment period.

[4] The only conclusion that the staff could reach with respect to the location of Courts' transmitter site was that *one* set of coordinates contained in its application was probably incorrect: either the coordinates were inaccurately listed in Section V-B, Item 4, and Section V-G, Item 1 of FCC Form 301 *or* the coordinates were incorrectly plotted on the 7.5-minute U.S.G.S. topographic site map.

[5] Although Courts cites *Carta Corporation,* 3 FCC Rcd 798 (MM Bur. 1988) as illustrative of an *Order* in which the staff did resolve a similar discrepancy confidently and reliably, the application in that proceeding involved a discrepancy which is distinguishable from the discrepancy presented in Courts' application. In *Carta Corporation,* an applicant had amended his application, listing conflicting coordinates for the proposed transmitter site in the amendment itself. The staff was able to resolve the discrepancy, however, because one set of coordinates listed in the amendment were consistent with the coordinates depicted on the amendment's topographic site map. Given a consistent set of coordinates, listed in the amendment and plotted on the site map, the staff could determine with a high degree of confidence that the applicant intended the transmitter site described by the coordinates listed in the amendment which matched the coordinates plotted on the site map. *See Carta Corporation,* 3 FCC Rcd at 799. Courts' application does not contain a similar set of consistent geographic coordinates, one listed and one plotted, for the proposed transmitter.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of:

Benjamin Macwan File No. BPH-861126MB

Life FM Partnership File No. BPH-861126MN

For a Construction Permit for
a New FM Station on Channel 294A
in Rayne, Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: May 26, 1989; Released: June 9, 1989

By the Commission:

1. The Commission has before it a petition for reconsideration filed February 1, 1988, on behalf of Benjamin Macwan, ("Macwan") and an application for review filed on August 20, 1987, on behalf of Life FM Partnership ("Life"). Pursuant to 47 C.F.R. § 1.106 (a), Macwan seeks reconsideration of the Mass Media Bureau's action dismissing his application in the *Hearing Designation Order* (" *Order* ") in the Rayne, Louisiana proceeding. *See Rayne Broadcasting Corporation, Inc.*, 2 FCC Rcd 7552 (MM Bur. 1987). Macwan's petition for reconsideration was referred to the Commission pursuant to 47 C.F.R. §1.104(b). Pursuant to 47 C.F.R. § 1.115, Life seeks review of the Bureau's letter of July 8, 1987, returning its application as unacceptable for filing.

2. *Background*. Both Macwan and Life submitted their applications for the Rayne, Louisiana frequency on November 26, 1986. On December 22, 1986, the applications were accepted for tender, thus triggering a 30 day period for Macwan and Life to file any amendments affecting the acceptability of their respective applications, including amendments pertaining to the location of their transmitter sites. Neither applicant filed such an amendment. Thereafter, the applications were reviewed for acceptability. Macwan's application was accepted for filing. However, staff review of Life's application revealed that the geographic coordinates for the proposed transmitter site listed in Sections V-B and V-G of Life's application conflicted with the coordinates for the site as plotted on the transmitter site map. Therefore, Life's application was returned as unacceptable for filing by letter from the Chief, FM Branch, on July 8, 1987. A more detailed review of Macwan's application subsequently revealed a similar discrepancy in that application, *i.e.*, the geographic coordinates specified in Macwan's application did not match the coordinates for the site as plotted on the transmitter site map. Therefore, Macwan's application was dismissed in the *Order* as inadvertently accepted for filing. *Rayne Broadcating Corporation, Inc.*, 2 FCC Rcd 7552. Both the Bureau's letter returning Life's application and the *Order* dismissing Macwan's application explained that the geographic coordinates, to the nearest second, of the proposed transmitter site are critical to processing the application. The Bureau pointed out that if the staff is unable to determine the location of the proposed transmitter because of a discrepancy between the location of the site as listed in the application and as plotted on the transmitter site map, the staff cannot evaluate, *inter alia*, the site availability certification or the information supplied for FAA approval. The discrepancy in site coordinates of both applications therefore made it impossible to determine, from the face of the applications, whether the proposals complied with Commission acceptability criteria.[1]

3. *The Pleadings*. In its petition for reconsideration, Macwan contends that the staff failed to follow current processing guidelines for FM applications in order to determine whether the discrepancy in his application could be resolved confidently and reliably. Further, Macwan contends that another applicant in the Rayne proceeding was allowed to amend its application following expiration of the amendment-as-of-right period in order to cure an acceptability defect; therefore, Macwan argues that dismissal of his application amounts to unfair disparate treatment. Macwan concludes that he too must be given the opportunity to amend his application to clarify the discrepancy in the site coordinates for his proposed transmitter. Life, in its application for review, contends that its application was acceptable for filing notwithstanding the discrepancy. Life asserts that the coordinates for its proposed transmitter site were consistently specified throughout the application, but incorrectly plotted on the transmitter site map. Therefore, Life argues that the staff could have confidently and reliably determined that the site intended was described by the coordinates listed in its application. Life also maintains that the plotting error did not affect the staff's ability to evaluate Life's proposal with regard to Commission rules on minimum distance separations set out at 47 C.F.R. § 73.207 or on environmental criteria at 47 C.F.R. §§ 1.1307, 1.1311. Finally, Life maintains that the Bureau erred in treating its application differently than applications for other services, which may be found to be acceptable in the absence of information required in the application form.

4. *Discussion*. With respect to Macwan's application, the staff initially failed to recognize the discrepancy in the transmitter site coordinates and, as a consequence, erroneously accepted Macwan's application. Under the "hard look" doctrine set out in the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19,936 (May 13, 1985), an accurate showing of the geographic coordinates is necessary to an acceptability determination.[2] *See* 50 Fed. Reg. at 19,945. *See Richard P. Bott, II*, 3 FCC Rcd 6063 (1988). Appendix D of the Report and Order in MM Docket No. 84-750 further states that if "on the face of the application [the coordinates are] visibly incorrect or inconsistent," and the discrepancy cannot be resolved "within the confines of the application and with a high degree of confidence, the presence of the clearly void data will be treated as functionally equivalent to the absence of such data." 50 Fed. Reg. at 19,946.

5. Both Macwan and Life assert that the staff could have confidently and reliably determined the correct coordinates for their respective transmitter sites. [3] However, the only conclusion that the staff could reach with respect to the location of the transmitter sites of Macwan and Life was that *one* set of coordinates contained in each application was probably incorrect: either the coordinates were inaccurately listed in Section V-B, Item 4, and Section

V-G, Item 1 of FCC Form 301 *or* the coordinates were incorrectly plotted on the 7.5-minute topographic site map. Consequently, we reject Life's contention that the staff could have concluded, with the requisite degree of confidence, that the geographic coordinates of the site intended were specified correctly throughout the application, but misplotted on the site map. It would have been equally reasonable for the staff to conclude that the site intended was correctly plotted on the transmitter site map but incorrectly listed throughout the rest of the application.

6. We also reject Life's contention that its application was acceptable notwithstanding the discrepancy. Even if the staff had assumed that the transmitter site was incorrectly plotted, the staff could not have determined whether the misplotted site was used by the applicant as the basis for the site availability certification or to obtain the site elevation used to determine the antenna height above average terrain and in obtaining FAA approval. Moreover, Life's argument requires, in effect, that its application be treated as two separate proposals because the staff would have to evaluate the acceptability of the proposal using each transmitter site. However, the "hard look" processing standards set out in the *Report and Order* in MM Docket 84-750, *supra*, were intended to streamline Commission procedures to make more efficient use of staff and other resources at a time when the Commission is experiencing a large influx of FM applications. *See Star Signal Corporation*, 1 FCC Rcd 450, 451 (1986); *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986); *Anchor Broadcasting Limited Partnership*, 2 FCC Rcd 7051 (MM Bur. 1987). The return of Life's application as unacceptable for filing upon a determination that the inconsistency in its application could not be resolved with a high degree of confidence reflects the Commission's present greater emphasis on providing service to the public in the most efficient, expeditious manner possible. *See Hillebrand Broadcasting, Inc.*, 1 FCC Rcd at 419. Requiring the staff to determine that the proposal, using each transmitter site, met Commission acceptability criteria would require the staff to temporize with Life's flawed proposal, in direct derogation of the goal of the "hard look" procedures. *Id.*

7. We also reject the contention of both Macwan and Life that their applications have been subject to unfair disparate treatment. First, Macwan alleges that another applicant in the Rayne, Louisiana proceeding was permitted to amend to cure a similar acceptability defect. Contrary to Macwan's allegation, the applicant in question was not similarly situated. The *Order* required applicant Rayne Broadcasting Company ("RBC") to amend to specify a site fully spaced to a new allotment in New Roads, Louisiana. Contrary to Macwan's assertion, that channel had not been allocated to New Roads at the time RBC filed its application for the Rayne allocation. Rather, the existing licensee of Channel 292A in New Roads had filed a counterproposal pursuant to a Notice of Proposed Rule Making to allot a new FM frequency to Brusly, Louisiana. 51 Fed. Reg. 24,873 (1986). The counterproposal requested that Channel 293C2 be substituted for Channel 292A in New Roads, and the existing license be modified to specify the Class C2 channel. RBC was not required to provide the minimum spacing protection to the counterproposal for New Roads. Subsequently, however, the Mass Media Bureau adopted the conterproposal for New Roads, effective June 1, 1987. *See Report and Order* in MM Docket 86-280, 2 FCC Rcd 2222 (MM Bur. 1987). Because RBC's application was now short-spaced to the New Roads allotment, the *Order* directed RBC to amend its application to specify a new fully spaced site. Unlike the Macwan application, RBC's application did not contain any internal inconsistencies which needed clarification. Rather, the RBC amendment was necessary to cure a deficiency in its proposal created by events occuring subsequent to the filing of RBC's application. Moreover, RBC was not directed to amend its application in order to clarify a discrepancy in its proposal. Therefore, Macwan and RBC are not similarly situated.

8. Life also contends that its application was unfairly subject to different treatment than an application for a commercial television station, which was found to be acceptable for filing without a contour coverage map. Specifically, Life argues that the *Report and Order* in MM Docket 84-750 does not modify the standards for determining the acceptability of an application. While Life is correct that the standards for acceptability of an application were not altered in MM Docket 84-750, the Commission in that Docket did severely limit the time period in which FM applicants may amend their applications to cure acceptability defects as a matter of right. *See* 50 Fed. Reg. at 19,941. Similar procedures were not adopted for AM and TV applications. Because Life failed to cure the acceptability defect in its application within the amendment-as-of-right period, the staff properly returned Life's application as unacceptable for filing.

9. Although Macwan cites *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965), for the proposition that dismissal of its application amounts to patently unfair disparate treatment, it is clear that neither Macwan nor Life has been treated differently than other applicants whose proposals contained similar deficiencies. The Bureau has consistently dismissed FM applicants whose proposals contained conflicting geographic coordinates for the location of a transmitter site which was not proposed to be mounted on an existing tower. *See, e.g., Lawrence L. Bush, Jr.*, 3 FCC Rcd 4771 (MM Bur. 1988); *Ocean Waves Broadcasting*, 3 FCC Rcd 4637 (MM Bur. 1988); *PN Radio Company*, 2 FCC Rcd 7358 (MM Bur. 1987); *William M. Piner*, 2 FCC Rcd 7095 (MM Bur. 1987); *Nevada Number One Radio Co.*, 2 FCC Rcd 6668 (MM Bur. 1987); *SEB Broadcasting Inc.*, 2 FCC Rcd 6401 (MM Bur.1987); *PN Radio Company*, 2 FCC Rcd 4045 (MM Bur. 1987); *Meridian Communications*, 2 FCC Rcd 3630 (MM Bur. 1987). Moreover, the Commission recently adopted two *Memorandum Opinion and Orders* denying applications for review which challenged the Bureau's dismissal of applications containing inconsistent geographic coordinates for the proposed transmitter sites. *Nicholasville Broadcasting Company*, FCC 89-88, adopted March 14, 1989; *Richard P. Bott, II*, 3 FCC Rcd 6063. Therefore, the arguments of Macwan and Life that dismissal of their applications was patently unfair is without merit. *See New Orleans Channel* 20, Inc., 830 F.2d 361, 366 (D.C. Cir. 1987).

10. Accordingly, for the foregoing reasons, IT IS ORDERED, that the petition for reconsideration filed by Macwan IS DENIED. IT IS FURTHER ORDERED, that the application for review filed by Life IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Absence of this data also makes it impossible to determine the distance from the proposed site to other proposed or existing broadcast facilities and to the community of license. The geographic location also determines whether protection must be afforded to monitoring facilities and to radio quiet zones (*See* 47 C.F.R. § 73.1030), marks the center of the "blanketing" area (47 C.F.R. § 73.315) and is fundamental to an analysis of a proposal's environmental and electromagnetic effects on other, nearby communications facilities.

[2] In particular, paragraph 4 of Appendix D states, in part:

> Compliance with the Commission's technical rules is evaluated in the course of an acceptability study. Certain engineering data must be present for such a technical acceptability study to be made. The absence of one or more elements of those data, listed below, prevents a determination of acceptability and thus renders the application not substantially complete.
>
> a. The geographic coordinates, to the nearest second, of the proposed transmitter site must be provided . . .

50 Fed. Reg. at 19,945.

[3] Although both Macwan and Life make this claim, neither party has specified how the staff could have made the necessary determination with the requisite degree of confidence. Also, the fact that the *Order* did not specifically state that the staff tried to resolve the discrepancy in Macwan's application does not mean that no effort was made to do so. The staff, considering the information provided in the application as a whole, was unable to resolve the discrepancy. It is basic FM processing policy to attempt to thus resolve all discrepancies found in applications. *See* 50 Fed. Reg. at 19,946. In returning such an application, however, the staff need not articulate the steps it has taken in an effort to confidently and reliably resolve the discrepancy. Having failed to set forth any method by which such a determination may have been made with respect to Macwan's application, his claim that the staff failed to follow the procedure set forth in Appendix D is unsubstantiated and without merit.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of:

R.A.D. Broadcasting Corporation — File No. BPH-860805MB

For a Construction Permit
for a New FM Station on Channel 284A
in Sturtevant, Wisconsin

MEMORANDUM OPINION AND ORDER

Adopted: May 26, 1989; Released: June 9, 1989

By the Commission:

1. The Commission has before it for consideration a petition for reconsideration filed March 1, 1988, on behalf of R.A.D. Broadcasting Corporation ("R.A.D."). Pursuant to 47 C.F.R. § 1.106(a)(1), R.A.D.'s pleading is a timely petition for reconsideration of the Mass Media Bureau's ("Bureau") action in the *Hearing Designation Order* ("*Order* ") denying R.A.D.'s petition for reconsideration of the return of its application for a new FM station in Sturtevant, Wisconsin. *See Sheboygan County Broadcasting Co., Inc.*, 3 FCC Rcd 541 (M.M. Bur. 1988). R.A.D.'s petition for reconsideration was referred to the Commission pursuant to 47 C.F.R. § 1.104(b). A timely opposition to R.A.D.'s pleading was filed on March 16, 1988, by Sheboygan County Broadcasting Co., Inc. ("Sheyboygan"), a party to the Sturtevant, Wisconsin proceeding.

2. *Background.* R.A.D. submitted its application for the Sturtevant, Wisconsin allocation on August 5, 1986. On September 19, 1986, the application was accepted for tender, triggering a 30 day period for R.A.D. to file amendments affecting the acceptability or grantability of its application, including amendments pertaining to the location of its transmitter site. R.A.D. did not file any amendment. Thereafter, R.A.D.'s application was reviewed for acceptability. Staff review revealed that the geographic coordinates for the proposed transmitter site listed in Sections V-B and V-G of R.A.D.'s application conflicted with the coordinates for the site as plotted on the site map. Therefore the application was returned as unacceptable for filing by a letter from the Chief, FM Branch on May 13, 1987. The Bureau's letter returning R.A.D.'s application explained that the geographic coordinates, to the nearest second, of the proposed transmitter site are critical to processing the application. The Bureau pointed out that if the staff is unable to determine the location of the proposed transmitter because of a discrepancy between the location of the site as listed in the application and as plotted on the site map, the staff cannot evaluate, *inter alia*, the site availability certification, the environmental statement, or the information supplied for FAA approval. The discrepancy in R.A.D.'s site coordinates therefore made it impossible to determine, from the face of the application, whether R.A.D.'s proposal complied with Commission acceptability criteria.[1] R.A.D. petitioned for reconsideration of the return of its application on June 15, 1987. R.A.D. argued in its petition for reconsideration that the geographic coordinates for its proposed transmitter site, as listed in its application, were incorrect due to a clerical error. R.A.D. further argued that the discrepancy could be resolved confidently and reliably from information contained in the application, resulting in a determination that the geographic coordinates for the intended site were correctly plotted on the transmitter site map. R.A.D. also attempted to file an amendment with its petition for reconsideration correcting the discrepancy in its application. R.A.D.'s petition for reconsideration was denied in the *Order* designating for hearing the two remaining mutually exclusive applications for FM service to Sturtevant, Wisconsin. *See Sheboygan County Broadcasting Co., Inc.*, 3 FCC Rcd 541.

3. The Bureau denied R.A.D.'s petition for reconsideration because R.A.D. failed to demonstrate that the staff erred in concluding that the correct site location could not be verified with the requisite degree of confidence. The Bureau also stated that R.A.D.'s curative amendment, submitted with the petition for reconsideration, was filed after the expiration of the period for filing amendments affecting the acceptability of an application, and therefore could not be accepted. Specifically, the Bureau rejected R.A.D.'s argument that the discrepancy could be resolved by using the site elevation specified in its application which was consistent with the elevation of the site plotted on the site map. The Bureau pointed out that the site elevation listed in the application is derived from the transmitter site map; therefore, if the the site had been incorrectly plotted, the values specified for the elevation would also be incorrect. Moreover, the Bureau rejected R.A.D.'s argument that the correct geographic coordinates for the site could be ascertained from plotting the street address given for the transmitter site since it is not possible, drawing on the application as a whole, to determine the geographic coordinates of the street address. The Bureau also rejected R.A.D.'s argument that because the FAA clearance was based on the coordinates plotted on the transmitter site map, the staff could confidently assume that the site plotted on the map correctly identified the intended site. R.A.D. submitted the same inconsistent information concerning the transmitter site location to the FAA. Noting the discrepancy, the FAA issued its clearance assuming use of the site plotted on the map. The FAA could just as easily have assumed use of the site specified in the application. Therefore, the staff could not reliably conclude that because the FAA cleared the site using the geographic coordinates plotted on the site map, those coordinates described the site intended. Finally, the Bureau concluded that the discrepancy in R.A.D.'s application could not be dismissed as an obvious clerical error because the incorrect coordinates had been listed in three places in its application. Accordingly, the Bureau found that R.A.D. failed to demonstrate, pursuant to 47 C.F.R. § 1.106, that the staff's return of its application was erroneous. Consequently, R.A.D.'s petition for reconsideration was denied and its application was dismissed. R.A.D. filed the subject pleading on March 1, 1988.

4. *The Petition for Reconsideration.* R.A.D. contends that its application should be accepted for filing and that it should be permitted to amend its application to correct the discrepancy. In support of these contentions, R.A.D. offers the following arguments. First, the geographic co-

ordinates were incorrectly listed in its application due to a clerical error made in the office of its consulting engineer who had been given the correct coordinates for the site by R.A.D. Second, because the geographic coordinates plotted on the transmitter site map should take precedence over the incorrectly transcribed coordinates, the staff could have resolved the discrepancy by assuming that the site intended was correctly described by the coordinates plotted on the site map. Third, other applicants whose proposals contained similar defects have been allowed to amend to correct the discrepancies. Finally, R.A.D. asserts that allowing amendment of the subject application would further the goals of the "hard look" doctrine because R.A.D. is a serious applicant whose proposal was not hastily prepared, frivolous or speculative. Therefore R.A.D. requests that its application be reinstated and designated for hearing with the other mutually exclusive applicants for the Sturtevant, Wisconsin allocation.

5. *The Opposition*. Sheboygan responds that dismissal of R.A.D.'s application was proper. Sheboygan states that R.A.D. is responsible for the accuracy of all data contained in its application; therefore its failure to correct the discrepancy may not be excused. Sheyboygan also asserts that R.A.D. has not been treated differently than other applicants whose proposals contained similar discrepancies. Sheboygan concludes that the discrepancy could not be resolved by the staff with a high degree of confidence and that the return of R.A.D.'s application was proper.

6. *Discussion*. The "hard look" doctrine set out in the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985) specifically states that an accurate showing of the geographic coordinates is essential to an acceptability determination. If the coordinates are either missing or visibly incorrect or inconsistent and the discrepancy cannot be resolved with a high degree of confidence from information provided in the application, then the staff cannot carry out the necessary acceptability study. Contrary to R.A.D.'s assertion, the procedures for processing FM applications make no provision for the staff to resolve site coordinate discrepancies by giving precedence to the coordinates for the site plotted on the map. Rather, the "hard look" guidelines require that the staff attempt to resolve the discrepancy drawing on the application as a whole. If the discrepancy cannot be resolved with a high degree of confidence, the application is "patently not in accordance with the . . . requirements" of Appendix D of the *Report and Order* in MM Docket No. 84-750 and therefore is unacceptable. 47 C.F.R. §73.3566(a). *See also Richard P. Bott, II*, 3 FCC Rcd 6063 (1988); 47 C.F.R. § 73.3522(a)(6). Accordingly, the staff properly returned R.A.D.'s application as unacceptable for filing.

7. R.A.D. makes specific arguments with respect to its contention that its application was improperly returned. First, R.A.D. argues that it should not be penalized by the error made by its consulting engineer, who had been given the correct site coordinates by R.A.D., but who inaccurately listed those coordinates in the application itself. Also, R.A.D. argues that acceptance of the application and accompanying amendment would further the goals of the "hard look" doctrine because it is a serious applicant whose proposal was not hastily prepared, frivolous, or speculative. Both these arguments are without merit because, as applicant, R.A.D. had the responsibility to review its application to insure the accuracy of coordinates of the transmitter site. *See generally Liability of James C. Vernon*, 30 FCC 2d 456 (1971); *WMOZ, Inc.*, 36 FCC 201 (1964); *Triangle Broadcasting Co.*, 49 RR 2d 1601 (ALJ 1981). Moreover, R.A.D. had ample opportunity to examine its application after its filing and to correct the discrepancy by submitting a perfecting amendment during the 30-day amendment period accorded applicants pursuant to 47 C.F.R. § 73.3522(a)(6). For these reasons R.A.D. cannot avoid dismissal of its application by assigning responsibility for the discrepancy in its application to its consulting engineer. In arguing that acceptance of its application would advance the goals of the new "hard look" processing standards, R.A.D. fails to recognize that these were intended to streamline Commission procedures to make more efficient use of staff and other resources at a time when the Commission is experiencing a large influx of FM applications. *See Star Signal Corporation*, 1 FCC Rcd 450, 451 (1986); *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986); *Anchor Broadcasting Limited Partnership*, 2 FCC Rcd 7051 (M.M. Bur. 1987). The return of R.A.D.'s application as unacceptable for filing upon a determination that the inconsistency in its application could not be resolved with a high degree of confidence reflects the Commission's emphasis on providing service to the public in the most efficient, expeditious manner possible. *See Hillebrand Broadcasting, Inc.*, 1 FCC Rcd at 419.[2]

8. Moreover, R.A.D.'s attempt on appeal to analogize the discrepancy in its application to the discrepancies in certain applications in the Fresno, California[3] proceeding is inapposite. In the proceeding cited, applicants Carta, New Life, Welch and VFB proposed to sidemount their respective antennas on an *existing* tower licensed by the Commission but each submitted applications with conflicting geographic coordinates. Because the applicants clearly proposed to locate their antennas on existing towers to which specific reference was made in each application, the staff could, drawing on the applications as a whole and on Commission records for the licensed facilities, confidently and reliably verify the respective transmitter locations and complete an acceptability study to determine each proposal's compliance with Commission rules. In the present case, however, amendment of R.A.D.'s proposal is absolutely essential to the staff's completion of an acceptability study because the amendment would provide the staff with information that could not be derived confidently from R.A.D.'s application and Commission records, *viz.*, which set of geographic coordinates accurately described R.A.D.'s proposed transmitter site. Therefore, R.A.D. and applicants Carta, New Life, Welch and VFB are not similarly situated.

9. R.A.D. also states that Brostrom, another applicant in the Fresno, California proceeding, was allowed to amend its application to correct a discrepancy in the coordinates for its transmitter site, even though the discrepancy was of great magnitude. The discrepancy in Brostrom's application, however, is different from that contained in R.A.D.'s application. Brostrom had timely amended his application, listing conflicting coordinates for the proposed transmitter site in the amendment itself. The staff was able to resolve the discrepancy because one set of coordinates listed in the amendment was consistent with the coordinates depicted on the topographic site map. Given a consistent set of coordinates, listed in the amendment and plotted on the site map, the staff could determine with a high degree of confidence that the applicant intended to

specify the transmitter site described by the coordinates listed in the amendment that matched the coordinates plotted on the site map. *See Carta Corporation*, 3 FCC Rcd at 799. R.A.D.'s application does not contain a similar set of consistent geographic coordinates, one listed and one plotted, for the proposed transmitter. Therefore, R.A.D. and applicant Brostrom are not similarly situated. *See Nicholasville Broadcasting Company*, FCC 89-88, adopted March 14, 1989. Contrary to R.A.D.'s analysis, the relevant inquiry is not the magnitude of the discrepancy, but rather whether the discrepancy can be resolved with a high degree of confidence so that the staff can determine the acceptability of the proposal.

10. Accordingly, for the foregoing reasons, IT IS ORDERED, that R.A.D.'s petition for reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Absence of this data also makes it impossible to determine the distance from the proposed site to other proposed or existing broadcast facilities and to the community of license. The geographic location also determines whether protection must be afforded to monitoring facilities and to radio quiet zones (*See* 47 C.F.R. § 73.1030), marks the center of the "blanketing" area (47 C.F.R. § 73.315) and is fundamental to an analysis of a proposal's environmental and electromagnetic effects on other nearby communications facilities.

[2] We also reject R.A.D.'s argument that its application should be reinstated because, unlike the other mutually exclusive applicants for the allocation, its principals have no other broadcast interests and are residents of the community of license. The acceptability of R.A.D.'s application must be judged on the content of the application and without consideration of factors such as other broadcast interests and residence. R.A.D.'s failure to comply with the technical requirement that the geographic coordinates of its transmitter site be consistently specified cannot be excused on the basis of an applicant's perception of its superior position based on comparative criteria considered at hearing. *Cf. ICBC Corporation* v. *FCC*, 716 F.2d 926 (D.C. Cir. 1983).

[3] *See Carta Corporation*, 3 FCC Rcd 798 (MM Bur. 1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 30, 1989

CLARIFICATION OF CAP ON COMMON LINE RATES PROPOSED PRICE CAP RULES FOR LOCAL EXCHANGE CARRIERS

CC DOCKET NO. 87-313

On April 17, 1989, the Commission released a Report and Order and Further Notice of Proposed Rule Making in CC Docket No. 87-313 (Further Notice) proposing new regulations to implement a system of price cap regulation that would be used to establish rates charged by local exchange carriers (LECs) for the origination and termination of interstate communications. As part of the overall proposal for establishing price caps for LECs, the Further Notice proposed a methodology for establishing a cap on the LECs' common line rates, which are principally used to recover the interstate portion of the cost of telephone lines between the LECs' central offices and subscribers' premises.

As the result of a May 26, 1989, *ex parte* meeting between representatives of the Common Carrier Bureau and the local exchange carrier industry, the Bureau has discovered a discrepancy between the language in the text of the Further Notice concerning the cap on common line rates and the proposed rule language appearing in Appendix D. While the text discusses calculations that are based on the entire common line revenue requirement, the rules can be read to indicate that a cap would be calculated from only one part of the common line revenue requirement -- carrier common line.

In order to clarify the Commission's proposal, the Bureau has prepared examples of how the common line cap would operate under various assumed conditions. The following examples represent the Commission's intended proposal for establishing a price cap for common line rates.

Clarification of the common line proposal does not in any way alter the common line formula as it appears in paragraph 725 of the text of the Further Notice.

EXAMPLES:

Assume that, in the base period,

1. Common Line (CL) Revenue Requirement per line = $7.00
2. Subscriber Line Charge (SLC) per line = $3.50
3. There are 100 minutes per line.

The implicit "total common line rate per minute," referred to in paragraph 718 of the Further Notice, is the CL Revenue Requirement per line divided by minutes per line, or $0.07. The Carrier Common Line (CCL) Revenue Requirement per line is the CL Revenue Requirement per line minus the SLC per line, or $3.50. The CCL rate is the CCL Revenue Requirement per line divided by minutes per line, or $0.035. In order to simplify the examples, we ignore distinctions between originating and terminating rates, or between premium and non-premium rates.

EXAMPLE 1

For our first example, we assume there are no exogenous changes, no growth in minutes per line, and a growth in the GNP-PI of 4 percent. Making these assumptions, and using the productivity factor of 3 percent, we compute the PCI for the common line basket to be:

$$PCI = 100 * [1 + (.04 - .03)]$$
$$= 101$$

permitting a 1 percent increase in the total CL rate per minute, to $0.0707. Since the SLC per minute is $0.0350, the allowed increase in the CCL rate is $0.0007. The CCL rate may increase to $0.0357.

EXAMPLE 2

For our second example, we assume there are no exogenous changes, the growth in the GNP-PI is 3 percent, so that the GNP-PI minus 3 percent productivity factor is zero, and that the growth rate of minutes per line is 8 percent. Using these assumptions, we compute the PCI for the CL basket to be:

$$PCI = 100 * [1 + [(.08 / 2) * (0 - 1)) / 1.08]]$$
$$= 100 * [1 - (.04 / 1.08)]$$
$$= 96.30$$

In this case, the declining PCI level requires that the total CL rate per minute decrease by 3.70 percent, to $0.0674. The 8 percent growth rate in minutes per line implies 108 minutes per line after one year. Because the SLC per line is fixed at $3.50, the "end user price per minute," referred to in paragraph 719 of the Further Notice, is $3.50 / 108 = $0.0324. The CCL price cap is the difference between the total common line rate per minute and the end user price per minute ($0.0674 - $0.0324 = $0.035). The CCL price limit remains unchanged.

EXAMPLE 3

Our third example combines the above two, assuming the GNP-PI grows at 4 percent and minutes per line grow at 8 percent. The PCI is then:

$$PCI = 100 * [1 + [.01 + ((.08 / 2) * (.01 - 1))] / 1.08]$$
$$= 100 * [1 - (0.0296 / 1.08)]$$
$$= 97.26$$

The falling PCI level requires that the total CL rate per minute decrease by 2.74 percent, to $0.0681. The end user price per minute is $0.0324 as in the second example, and the CCL price cap is the difference ($0.0681 -$0.0324 = $0.0357). The CCL rate may increase by 2 percent as in the first example.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 89-45

In the Matter of

Amendment of Part 90 of the
Commission's Rules to Expand
Eligibility and Shared Use
Criteria in the Private Land
Mobile Services

ORDER EXTENDING COMMENT PERIOD

Adopted: May 31, 1989; Released: June 1, 1989

By the Deputy Chief, Private Radio Bureau:

1. On February 22, 1989, the Commission adopted a *Notice of Proposed Rule Making* (*Notice)* in the above-captioned matter which was published in the *Federal Register* on April 7, 1989 at 54 Fed. Reg. 14109. The published deadlines for filing comments and reply comments to this *Notice* were May 19, 1989 and June 5, 1989, respectively. The Associated Public Safety Communications Officers, Inc. (APCO) and the American Petroleum Institute (API) have submitted requests to extend the period for filing reply comments in this proceeding.[1] Both APCO and API state that given the large volume of initial comments filed, they require additional time to complete their review and prepare an adequate reply. We find good cause has been shown to grant some additional time for the filing of reply comments.

2. Accordingly, IT IS ORDERED, pursuant to the authority set forth in Section 0.331 of the Commission's Rules and Regulations, that the deadline for filing reply comments to the subject *Notice of Proposed Rule Making* is extended to July 5, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Beverly G. Baker
Deputy Chief, Private Radio Bureau

FOOTNOTE

[1] Request for Extension of Time, filed by APCO on May 24, 1989 (seeking a 10 day extension of time); Motion for Extension of Time, filed by API on May 25, 1989 (seeking to extend the reply comment date to August 7, 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 1, 1989

COMMON CARRIER BUREAU ISSUES FURTHER INSTRUCTIONS FOR FILING OF SHARED NETWORK FACILITIES AGREEMENTS

CC Docket No. 85-166, Phase I

On May 9, 1989, the Common Carrier Bureau issued an Order directing American Telephone and Telegraph Company (AT&T) and the Bell Operating Companies (BOCs) to file copies of all Shared Network Facilities Agreements (SNFAs) negotiated between AT&T and the BOCs on June 13, 1989. *Investigation of Special Access Tariffs of Local Exchange Carriers*, CC Docket No. 85-166, Phase I, DA 89-522, released May 9, 1989 (Com.Car.Bur.). Specifically, the Bureau directed Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Bell, Southwestern Bell, and US West (collectively, the RBOCs) to file a copy of the Master SNFA and Attachment A, the Standard Costing Manual, together with any amendments to either of these documents that they had negotiated with AT&T. To the extent that the RBOCs executed more than one Master SNFA for their operating companies, they are directed to file only one Master SNFA together with a certification that the Master SNFA is identical for each of their operating companies. The Bureau also required each RBOC to file a copy of all schedules for lease of facilities to AT&T that were in effect between April 1, 1985, the effective date of the special access tariffs, and June 13, 1989, together with a list of charges paid thereunder. Similarly, AT&T is required to file copies of all schedules for lease of facilities to each RBOC that were in effect between April 1, 1985, and June 13, 1989, together with a list of charges paid thereunder. In addition, the Bureau directed the RBOCs and AT&T to indicate the expiration date of any SNFA schedule that is no longer in effect. Finally, the RBOCs and AT&T were ordered to state the total billings for all schedules under each of the SNFA articles for each of the years 1985, 1986, 1987, and 1988 for each state and for the life of the contracts.

In order to ensure that the filings are readily usable by members of the public and by the Commission staff, the RBOCs and AT&T shall also comply with the following instructions. The filings discussed in this public notice shall be filed in Room 535, 1919 M St. NW, Washington, D.C. between the hours of 8:00 AM and 5:30 PM. The supplemental direct cases that AT&T and the RBOCs are also required to submit on June 13, 1989, shall be filed in the Office of the Secretary, Room 222.

Instructions for copies filed with the Commission:[1] The Master SNFAs and attachments and all schedules for the lease of facilities from a RBOC to AT&T or from AT&T to a RBOC shall be filed in ACCOPress or similar binders. AT&T and the RBOCs need not file each individual schedule in a separate binder, but no binder shall contain more than three inches of material. Materials should be three-hole punched in the left-hand margin so as to allow insertion in standard three-ring binders. If, however, in the carrier's judgment this would obliterate a significant portion of the text of the documents, the materials may instead be hole-punched in the top margin and similarly bound. A carrier's entire filing should be bound either in the left-hand margin or in the top margin. All materials shall be filed on letter-size (*i.e.*, 8 1/2 x 11 inch) paper.

The preferred method for organizing the schedules is by state and, within each state, by SNFA article. We recognize, however, that for some of the RBOCs it may not be possible to separate schedules both by state and by SNFA article. Therefore, consistent with our understanding of the existing filing methods employed by the RBOCs, carriers are directed at a minimum to separate schedules by state or by SNFA article. To the extent that an RBOC has maintained its SNFA schedules on an operating company basis, and if a state-by-state organization is not possible, schedules shall be separated by operating company. Whichever method of organization is employed, carriers shall file SNFA schedules for each organizational unit in separate binders. In other words, if NYNEX's schedules are organized by article, but not by state, NYNEX shall file New York Telephone Article 2 SNFAs separately from SNFAs entered pursuant to other Articles. New England Telephone SNFAs shall be organized in the same manner. Similarly, if Ameritech has organized its SNFA schedules by state, but not by article, Ameritech shall file SNFAs for Illinois separately from SNFAs for Indiana, Michigan, Ohio, and Wisconsin. AT&T shall separate its SNFAs to correspond to the regions served by each RBOC and, within each region, shall separate SNFAs by state or by article. In order to facilitate duplication of the materials filed, schedules shall not be stapled.

AT&T and the RBOCs shall place in the front of each binder a list of the schedules contained therein listing the identifiers already carried by the schedules. The index shall also indicate whether the SNFA schedule has expired or remains in effect.

AT&T and the RBOCs shall label the front cover of each SNFA binder as follows:[2]

[Carrier]

[State]
[SNFA Article]
Book [x of y]

The SNFA binders shall be submitted in boxes which shall bear the carrier's name and be clearly numbered, beginning with 1, on the top of the box and on each end of the box. [3] Box 1 of each RBOC's filing shall contain the Master SNFA and Attachment A, the Standard Costing Manual, together with any amendments to either of these documents that the RBOC has negotiated with AT&T. Box 1 may also include SNFA schedules, if space permits. Consistent with the requirements established above, the contents of each box containing SNFA schedules shall be organized by state and by SNFA article, to the extent possible. States shall be organized alphabetically and SNFA articles shall be organized from 2 through 8. For example, after the Master SNFA, Attachment A and amendments, Ameritech's filing shall continue with

schedules relating to facilities located in Illinois. Schedules relating to facilities located in Indiana, Michigan, Ohio, and Wisconsin shall follow. Boxes may contain schedules from more than one state or article if space permits.

AT&T and the RBOCs shall provide a comprehensive index of their filings. This shall provide a more general listing of the contents of the filing. The comprehensive index shall list the binders containing SNFAs from a particular organizational unit (*i.e.*, New York Telephone Article 2 SNFAs; Illinois SNFAs). The comprehensive index and the indices of the contents of individual binders shall be provided both in hard copy and on low-density diskettes suitable for use with personal computers. Data shall be entered in a standard word-processing format. In addition, the comprehensive index shall include a brief narrative description of the method by which the carrier's filing is organized (i.e., by state, by SNFA article, or both).

Instructions for copy filed for ITS: The above instructions apply to the copy of the filing that each RBOC and AT&T is required to file with ITS with the following exceptions.

SNFA schedules shall not be filed in ACCOPress binders or in any other type of binder. Pages should not be hole-punched or stapled. Materials that are filed in binders for Commission copies shall be fastened with elastic bands for the ITS filing. Each such package shall include a photocopy of the front cover of the corresponding binder as the first page of the package.

For further information, contact Kelly Cameron at (202) 632-6917. Questions concerning the acquisition of copies of all or portions of this filing should be directed to Wilber Thomas, International Transcription Service, 857-3819.

FEDERAL COMMUNICATIONS COMMISSION

FOOTNOTES

[1] The May 9 Order required three copies to be filed for Commission use. Two of these copies will be for use by the Dockets Branch, and the remaining copy will be for use by the Bureau. A fourth copy, for use by International Transcription Service, also was required to be filed by the May 9 Order.

[2] If the carrier's filing is not organized by state or by article the carrier should leave the appropriate line blank. If a RBOC has organized its SNFAs on an operating company basis, the label should so indicate.

[3] Each copy of the filing shall be organized in the same manner. In order to facilitate the separation of the four copies to be filed, each box shall bear a letter designation as well. Copy "A" shall be designated as the original copy for the Dockets Branch. Copy "B" shall be designated as the duplicate copy for the Dockets Branch. Copy "C" shall be the copy filed for the use of the staff of the Common Carrier Bureau. Finally, Copy "D" shall be filed for ITS.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 2, 1989

BELL ATLANTIC FILES PETITION FOR WAIVER REGARDING ACCESS SERVICE OFFERING

On May 24, 1989, the Bell Atlantic Telephone Companies (Bell Atlantic) filed a petition for waiver of Sections 69.106 and 69.205 of the Commission's Rules to permit establishment of a separate "Call Setup Charge." These sections require that the Local Switching rates for premium access service and non-premium access service be expressed in dollars and cents per minute, and specify a single rate element for both LS1 and LS2. Bell Atlantic seeks a waiver of these rules to permit it to recover LS1 and LS2 charges using two complementary rate elements: a per-message Call Setup Charge and a per-minute usage charge. On the same date, Bell Atlantic filed Transmittal No. 310, scheduled to become effective August 1, 1989, to introduce a Call Setup Charge switched access rate element under the Local Switching category. Petitions seeking suspension or rejection of this tariff transmittal are due no later than June 8, 1989.

Interested parties should consolidate their comments on the Bell Atlantic waiver petition with their petitions on the Bell Atlantic tariff filing, due no later than June 8, 1989. Reply comments concerning the waiver and the tariff transmittal may be filed no later than June 16, 1989.

Parties are requested to furnish copies of comments and reply comments to International Transcription Service, Inc. (ITS), the Commission's duplicating contractor, at their office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and to the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of Bell Atlantic's waiver petition, along with other related documents, may be obtained from ITS. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W. An original and four copies of all comments and replies must be filed, in accordance with Section 1.51(c) of the Commission's Rules. In addition, one copy of each comment or reply must be filed with ITS.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

BC Docket No. 81-742

In the Matter of

Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process

FIRST REPORT AND ORDER

Adopted: March 30, 1989; Released: May 16, 1989

By the Commission: Commissioner Dennis concurring in part and dissenting in part and issuing a statement.

I. INTRODUCTION

1. This *Report and Order* constitutes the Commission's first action in resolving a lengthy comprehensive inquiry, begun in 1981,[1] to obtain public comment on methods of improving the broadcast renewal process. It addresses two of five broad issues raised for comment in our *Second Further Notice of Inquiry*, the most recent action in this docket.[2]

2. First, in response to troubling allegations that some parties might be using the renewal process to obtain payments or benefits from the renewal applicant unrelated to any legitimate public interest aims, we invited public comment on this alleged abuse of the comparative renewal process.[3] Specifically, we asked whether competing applications and petitions to deny were filed against license renewal applicants to exact large settlement payments for dismissing these challenges, and whether limitations on settlement payments would help curb such abuse. In line with virtually unanimous support from the commenters for limitations on settlement payments, we are: (1) banning all payments that can be made to competing applicants, other than to the incumbent licensee, in exchange for withdrawing an application prior to the Initial Decision stage of the comparative hearing, and thereafter, limiting payments to the legitimate and prudent expenses of the withdrawing applicant; (2) limiting payments that can be made in exchange for withdrawing petitions to deny to the legitimate and prudent expenses of the withdrawing petitioner; and (3) reviewing citizens' agreements reached in exchange for withdrawing petitions to deny on a case-by-case basis. These measures should effectively remove the economic incentive present in the renewal system to file competing applications and petitions to deny for the principal purpose of extorting settlements in exchange for dismissing these challenges.

3. Second, we sought comment on whether we should eliminate the *Cameron* doctrine, a policy that allows competing applicants in a comparative renewal proceeding to presume that they could acquire the incumbent licensee's transmitter site if they prevail. This presumption generally permits applicants to avoid submitting an independent engineering proposal with their application. Consistent with the comments, the Commission is eliminating this policy, and requiring competing applicants to provide reasonable assurance of site availability.

4. The Commission also sought comment on other proposed reforms of our license renewal process which will be resolved separately. First, we sought comment on whether we should modify FCC Form 301 to require competing applicants in a license renewal context to submit additional information as another means of deterring non *bona fide* applicants. We also sought comment on similar proposed amendments to Form 301 in General Docket No. 88-328, which applies more broadly to all applications for construction permits, including applications that are mutually exclusive with license renewal applications. We are incorporating by reference the comments and reply comments submitted in this proceeding on proposed Form 301 amendments into General Docket No. 88-328. In a *Report and Order* adopted concurrently with this *Report and Order*, we are amending Form 301 to require all applicants to provide more financial, ownership and integration information.[4] In so doing, we expect, among other things, to discourage financially unqualified, sham and abusive applicants from filing competing applications in the license renewal context, and to provide the means to identify such persons who do file.

5. Another potential incentive for abuse of the FCC's license renewal process are the unclear standards currently used in a comparative hearing to determine whether an incumbent licensee or a competing applicant will best serve the public interest, convenience and necessity. Because the Commission believed that meaningful reformation of the license renewal process could only be accomplished by striking at all incentives for abuse, including uncertain license renewal standards, we sought comment on proposals to reform these renewal standards. Specifically, the Commission sought comment on proposals to clarify its standards for awarding a so-called "renewal expectancy," a credit awarded to incumbent licensees for "meritorious" service that meets the needs and interests of its community of license; and proposals to eliminate, or reduce in weight, certain of the criteria used to compare incumbent licensees and competing applicants in a renewal proceeding. For reasons stated in a separate *Third Further Notice of Inquiry*,[5] the Commission is seeking comment on an additional proposal for making the Commission's renewal expectancy standard more concrete and less subject to protracted litigation and abuse. Those portions of this proceeding pertaining to the renewal expectancy standard, as well as the other comparative criteria, will be held open pending further comment.

6. A key purpose of this inquiry was to reduce abuse of our license renewal process by correcting the underlying opportunity for abuse (uncertainty in our renewal standards), the incentive for abuse (the potential for large settlement payoffs), as well as the mechanisms for abuse (streamlined filing requirements that have had the unintentional effect of making it easier for non *bona fide* applicants to file competing applications). This *Report and*

Order, along with our *Form 301 Report and Order*, constitute the first significant steps toward eliminating abuse of our license renewal process.

II. PAYMENT LIMITATIONS

A. *Background*

7. In 1987, we initiated MM Docket No. 87-314 to look at abuses of Commission processes generally.[6] In our *Second Further Notice* in this proceeding we incorporated all abuse issues raised in MM Docket No. 87-314 directed or otherwise related to the comparative renewal process.[7] The major types of abuse, which are the focus of this proceeding, are the use of competing applications, petitions to deny or citizens' agreements to extract money or other consideration from incumbent licensees or other mutually exclusive applicants, rather than to further the Commission's public interest goals.

8. Under our rules, any person may file an application for construction of a station that is mutually exclusive with an application for license renewal.[8] Such applications generally necessitate a comparative hearing to determine whether grant of the license to the incumbent or the challenger best serves the public interest.[9] Settlements among mutually exclusive applicants in the comparative renewal context are governed by Section 311(d) of the Communications Act. The statute makes it unlawful for a competing applicant to agree to withdraw an application "in exchange for the payment of money, or the transfer of assets or any other thing of value" by any other applicant "without approval of the Commission."[10] The statute further provides that:

> The Commission shall approve the agreement only if it determines that (A) the agreement is consistent with the public interest, convenience, or necessity; and (B) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.[11]

9. The right to file a petition to deny is provided by Section 309(d) of the Communications Act.[12] A petition to deny is the process by which any person may challenge, among other things, an incumbent's license renewal on the grounds that the licensee lacks qualifications or that grant of the application would otherwise be inconsistent with the public interest.[13] It enables interested parties to provide information to help the Commission to determine whether grant of the application is in the public interest.[14] Unlike competing applications, there is no specific statutory provision that governs settlements of petitions to deny.

10. A citizens' agreement is a formal, written agreement between a citizens' group (*e.g.*, civic association, listeners' group, consumer organization, church group or minority or civil rights protective organization) and a broadcast licensee which usually addresses some aspect of a station's programming or employment practices. Citizens' agreements can be reached in numerous contexts. Those pertinent to our discussion here are reached in exchange for the withdrawal of a petition to deny. Under our current policy, we examine citizens' agreements which are incorporated in applications to the Commission or which are presented in a complaint or a formal request for review. We review them to ensure that they do not improperly impinge upon the licensee's nondelegable discretion and otherwise comply with applicable rules. In addition, we regard proposals of future performance, that are relevant to our decision making process, as representations to the Commission.[15]

11. Since 1982, we have not imposed any general limits on the amount of money or other consideration competing applicants or petitioners can receive in exchange for dismissing a renewal challenge.[16] Furthermore, as a part of our regulatory reforms, we significantly reduced the filing requirements for competing applicants.[17] We are concerned that these reforms have had the unintended result of encouraging the filing of non *bona fide* applications and petitions to extort settlements rather than for the intended goals of obtaining a license or identifying deficiences of incumbent licensees.

12. We solicited comment on a number of issues related to this potential abuse: (1) whether the public interest warranted reestablishing our policy of limiting payments made in settling competing applications and petitions to deny, including settlements in the form of citizens' agreements; (2) whether limits on settlements of competing applications are consistent with Section 311(d); and (3) whether the Commission should modify its current policy of treating programming promises in citizens' agreements as representations to the Commission.[18]

B. *Comments.*

13. Virtually all commenters who addressed these abuse issues, representing both industry and public interest groups, assert that abuse is a serious problem that warrants immediate Commission action. The clear majority of commenters support limitations on settlement payments for the dismissal of both competing applications and petitions to deny.

14. *Competing Applications.* Nineteen of the twenty-two comments which addressed the issue support limitations on settlements of competing applications.[19] Southeast Broadcasting Limited Partnership and Garden State Broadcasting Limited Partnership ("S.E. Broadcasting"), competing applicants in license renewal proceedings, filed the only comments that oppose monetary limits on settlement agreements on policy grounds. They assert that (1) the Commission is operating on a mere presumption that abuse of process actually exists; (2) the proposed limits would single out competing applicants in the renewal context (as opposed to applicants in the comparative new context) as presumptively dishonest without sufficient basis; and (3) the Commission has recognized settlements as a desirable means of resolving lengthy litigation and restoring normal broadcasting service.[20]

15. The majority of commenters that address the issue of whether the Commission has jurisdiction under section 311(d) of the Act to limit payments assert that Section 311(d) does not preclude the Commission from limiting the amount of consideration a competing applicant may receive in return for withdrawing its application.[21] In contrast, Southeast, along with The American Women in Radio and Television ("AWRT") and National Hispanic Media Coalition ("NHMC"), argue that the Commission lacks such authority.[22]

16. The commenters are fairly evenly split on the issue of what type of payment limitations should be imposed. CBS, Capital Cities/ABC, and the Office of Communica-

tion of the United Church of Christ, joined by six public interest groups ("UCC *et al.*"),[23] among others,[24] favor limiting payments to legitimate and prudent expenses for settlements of competing applications.[25] These parties assert that this limitation achieves the proper balance between encouraging responsible participation in comparative renewal challenges and discouraging those who use the process merely to extract settlements.[26] Commenters argue that a total ban on payments may deter legitimate challengers from reaching good faith settlements, unnecessarily extend renewal proceedings, waste Commission resources and keep a cloud over the license. They argue that allowing settlements for legitimate and prudent expenses will provide a way out of the process for applicants so they will not be irretrievably committed to all or nothing results.[27]

17. In contrast, the National Association of Broadcasters ("NAB"), Action for Children's Television ("ACT") in joint comments with the Media Access Project ("MAP") and Henry Geller and Donna Lampert ("Geller & Lampert") (hereinafter "ACT *et al.* "), and Leibowitz & Spencer on behalf of broadcasters and state broadcast associations,[28] among others,[29] assert that we should permit no financial or other consideration in exchange for dismissing a competing application in a comparative renewal proceeding. These parties assert that banning all payments is the only way to assure that competing applications are filed for the sole purpose of acquiring a broadcast license, rather than for private gain, harassment or speculation. They argue that permitting even legitimate and prudent expenses will not deter speculative filers because a challenger can still file a no-cost, no-risk application, whereas a complete ban will force speculators to consider a risk/benefit analysis before filing an application. Finally, they assert that a complete ban on settlement payments will not deter legitimate competing applicants because the incentive for filing -- a very valuable license -- is still there.[30]

18. The Capital Broadcasting Corporation, in joint comments with other broadcast licensees ("CBC *et al.* "), suggest a middle ground between the two proposals. They urge the Commission to adopt a "rebuttable presumption" that payments in exchange for the withdrawal of competing applications are contrary to the public interest. To overcome the presumption, parties to a settlement agreement would be required to explain why payment would be in the public interest. In no case, should the Commission approve payments in excess of legitimate and prudent expenses.[31] Other parties urge the Commission to adopt waiver provisions similar to CBC's rebuttable presumption. These include waiving the ban (or legitimate and prudent expense limit) if payment is "in the public interest,"[32] or "further[s] some important Commission rule or policy,"[33] or upon a showing of "unique and compelling circumstances."[34]

19. *Petitions to Deny*. As with competing applications, the majority of commenters advocate limiting payments for settlements of petitions to deny.[35] With a few exceptions, the commenters would impose the same types of limits on settlements of petitions to deny as on competing applications.[36] Capital Cities/ABC, ACT *et al.* and the NBMC, which support limits on settlements of competing applications, would impose no limits on settlements of petitions to deny. They argue that petitions to deny serve a particularly key monitoring and compliance role, and that the Commission would be undermining this public interest function if it imposed settlement limitations on petitions.[37] AWRT, which opposes limiting settlements of competing applications on legal grounds, favors limiting settlements of petitions to deny to legitimate and prudent expenses.[38]

20. *Citizens' Agreements*. Five parties specifically commented on citizens' agreements. NAB urges the Commission not to enforce citizens' agreements, asserting that they could be litigated in local courts without burdening Commission resources. The remaining parties urge the Commission to continue to enforce such agreements.[39] The UCC *et al.*, for example, assert that citizens' agreements are a "particularly valuable method for resolving issues raised by the petition to deny process," "promote communication among broadcasters and their listening audience," and provide standards against which a licensee's performance should be measured.[40] They further assert that the enforcement of citizens' agreements should not be abandoned to the courts because courts lack the expertise to determine whether the agreements are consistent with FCC policies and the evolving public interest standard.[41] CBC *et al.* would allow payments above expenses in connection with citizens' agreements in the form of "fair remuneration for services that clearly further a legitimate Commission goal, actually rendered by clearly legitimate enterprises only."[42]

C. *Discussion*

21. *Need for Limits*. Based upon a careful review of the record, as well as our own experience in administering the licensing process, we find that there is the clear potential for abuse of our license renewal process. Our current policies, taken together, provide, albeit unintentionally, the incentives and mechanisms for abuse of our license renewal process. First, as discussed in detail in our *Third Further Notice* adopted concurrent with this *Report and Order*, our standards for license renewal are uncertain and not easily applied. This uncertainty in our renewal process provides a significant opportunity or incentive for abuse. An incumbent licensee, faced with vague standards for obtaining a license renewal and a lengthy and expensive hearing process, is vulnerable to settlement demands of challengers, particularly when the incumbent has substantial capital or other investments tied up in a broadcast facility. Our current policy of generally approving settlement payments[43] seems to have created an additional incentive for parties, who may have no real interest in obtaining a broadcast license, to challenge a license renewal application. In addition, our efforts to streamline the application process in 1981 have had the unintended result of making it easier for unqualified and non *bonafide* persons to file competing applications.[44] Finally, our policy of permitting applicants to rely on an incumbent's transmitter site, which in turn allows them to piggy back on an incumbent's engineering proposal in their applications, also makes it easier for non *bona fide* persons to file applications. These gaps in critical information in the application also make it difficult for incumbents to evaluate the merits of the challenges.

22. Abuse of the renewal process hurts the public interest in several ways. Incumbent licensees are required to expend considerable amounts of money to defend against and pay off challengers, including those who are unfunded and have no real intention of owning or operating a station.[45] Moreover, the staff and management of the incumbent are forced to spend considerable funds as well

as time and effort opposing challenges to license renewals.[46] The expenditure of such resources that otherwise might have been devoted to programming and other services, to defend against an abusive challenge is inefficient and wasteful.[47] Non *bona fide* challenges may also discourage *bona fide* competing applicants,[48] and unnecessarily drain Commission resources. Accordingly, the Commission finds that the public interest would be better served if we amend our rules and modify our policies to reduce this potential for abuse. This *Report and Order* takes the first step to remove these incentives and mechanisms for abuse by imposing strict limitations on settlement payments that can be made in exchange for withdrawing license renewal challenges.

23. S.E. Broadcasting charges that the Commission has no proof that its process is being abused, or that renewal challengers as a class (as opposed to new applicants) are likely to engage in improper conduct.[49] In our *Abuse of Process Notice* as well as our *Second Further Notice* herein, we asked commenters whether our preliminary concerns over possible abuses were warranted. Commenters, including a large number of broadcasters, virtually unanimously agree that there is widespread abuse of our process. Numerous commenters provide examples of alleged abuse. For example, Metroplex states that an abusive renewal challenge to station WHYI has forced it to devote hundreds of hours of management time to retain its license.[50] Great American alleges that a competing application was filed by an advertising agency against a station of its predecessor company not to obtain a license, but to force it to resolve a dispute with the agency regarding payment for advertising. Great American contends that its predecessor company was forced to settle because the license renewal challenge aborted a previously negotiated agreement for the sale of the station, and prevented the licensee from pursuing plans to sell the station.[51]

24. A study conducted by the NAB attempting to quantify abuse in the license transfer and renewal context[52] generated numerous additional examples of reported abuse. Respondents to the survey variously reported, for example, that they have been threatened with license renewal challenges unless they contributed to the challenger's organization, that they regularly contribute to certain groups to avoid license renewal challenges, and that they have been subjected to costly competing applications by disgruntled former employees.[53] Finally, concern about abuse in license renewal proceedings is also reflected in industry and other publications.[54] Accordingly, based on all the materials before us and our own experience, we believe our action to eliminate the mechanisms and incentives for abuse is warranted.

25. *Competing Applications*. As we noted above, the parties are divided in their views on whether we should impose a complete ban or a legitimate and prudent expense limitation on settlement payments. We have carefully evaluated the comments supporting both proposals, as well as the rebuttable presumption and waiver options, and weighed all these options against the *status quo*. For the reasons discussed below, we are adopting a policy prohibiting all payments to competing applicants (other than the incumbent licensee) for the withdrawal of an application prior to the Initial Decision stage of a comparative hearing.[55] Thereafter, we will approve settlements that do not exceed the withdrawing party's legitimate and prudent expenses for filing and litigating the competing application.

26. We believe this approach furthers a number of important policies. By prohibiting all payments in excess of legitimate and prudent expenses made anytime during a comparative hearing, we are eliminating most of the potential profit to applicants in filing competing applications. This should virtually eliminate those applicants whose purpose in filing is to settle out for profit and generally assure that applications are being filed solely for their intended purpose -- that of acquiring a broadcast license. By banning all settlement payments through the Initial Decision stage, we are further reducing the potential for abuse. First, we are increasing the likelihood that only serious, *bona fide* applicants will have the opportunity to settle out their competing applications. It is time consuming and expensive to litigate an application through the Initial Decision stage.[56] Moreover, an applicant that makes it through the Initial Decision stage has demonstrated that it is willing to develop a complete record on all pertinent hearing issues including technical issues, standard comparative issues and any basic qualifications issues designated (*i.e.*, those bearing on character, misrepresentation, and financial qualifications). For these reasons, we believe that an applicant's prosecution of its application through the Initial Decision stage is a persuasive indication of the *bona fides* of the application. Thus, restricting settlements to the post-Initial Decision stage helps ensure that settlements will be among *bona fide* competing applicants and incumbents only.

27. Second, we are removing the opportunity that non *bona fide* applicants currently have to exert undue pressure on incumbents to settle early in a comparative proceeding. Now, settlements most often occur at the beginning of the comparative process, when an incumbent still faces a long, expensive license renewal process, experiences the disadvantages of having a cloud over its license during that process, and has little information with which to evaluate challengers' applications. Under these circumstances, even a non *bona fide* challenger has great leverage over an incumbent and the incumbent has tremendous economic incentives to settle. This situation is ripe for abuse.

28. After the Initial Decision, however, the potential for abuse is dramatically diminished. If the Initial Decision favors the incumbent,[57] the incumbent is under far less pressure to settle. The incumbent goes into the appeal process with a decision in its favor; the expense of litigating an appeal is generally a fraction of the cost of obtaining the Initial Decision; and the incumbent knows the merits and demerits of the challenger's application. For these same reasons, a challenger generally has less leverage to force a settlement and its leverage is more consistent with the relative merits of its application. For example, if the evidence presented during the hearing raises serious questions about the challenger's financial qualifications, the challenger has less leverage to negotiate a settlement than if it presented a strong comparative case with no disqualifying issues at the hearing. Under these circumstances, an incumbent is under less intense pressure to settle, and has the information needed to make an efficient economic decision. It can determine whether it is less costly (in terms of money, staff resources, reputation, and the possibility of losing an appeal) to settle or litigate through the appellate process. At the same time, the Commission can be more certain that any such decision to settle is being driven by traditional considerations, such

as the cost of the appeal to the incumbent and the strength of the competing applications, rather than by applications filed in abuse of our processes.

29. In banning settlement payments prior to the Initial Decision only, we carefully considered commenters' concerns that a total ban on settlements may deter responsible participation in license renewals. We believe these carefully drawn restrictions will accomplish our goal of removing the potential for abuse of our process without unnecessarily deterring *bona fide* competing applications. The primary incentive for filing a competing application -- a potentially valuable television or radio license -- remains in place. Applicants who are intent upon obtaining a valuable broadcast license will not be deterred by our elimination of the potential for profiting from the application. Nor should serious applicants be deterred by the fact that they cannot recover fees or expenses prior to the Initial Decision stage. A serious challenger files because it believes it has a reasonable chance of obtaining a license -- not because it has the opportunity for recovering fees and expenses prior to the hearing.

30. Moreover, by permitting recovery of legitimate and prudent expenses only after the Initial Decision stage, we are requiring challengers to fully evaluate the risks and benefits of their application before filing. If challengers know that they have the potential for recovering fees and costs only if they make it through the Initial Decision stage, and that their bargaining power depends on the strength of their case after it has been subjected to scrutiny at the hearing, they will be forced to evaluate the risks and benefits of their applications before filing. Forcing applicants to make such a cost benefit analysis before filing should encourage, not deter, responsible participation in the license renewal process.

31. To the extent our new policy weeds out weak applicants, we believe this is a desired result. Under our current policy, weak applicants who may have a very slim chance of prevailing can file no-risk, no-cost applications because they are virtually assured of recovering at least attorney's fees and costs for dismissing their applications. We believe our new policy will discourage these weak applicants, and thereby reduce the pool of non serious competing applicants and the cost of the hearing to the Commission and incumbents without unduly discouraging serious applicants.

32. Finally, our new policy is consistent with our belief that settlements, *where abuse of process is not a factor*, can be an efficient way to resolve comparative licensing proceedings, preserve funds for service to the public, and allow us to conserve our limited administrative resources. We agree with commenters that a complete ban on settlement payments may lock perfectly legitimate parties into a fight to the end, which may unnecessarily extend the renewal proceeding. Thus, we will continue to encourage settlements as a means to efficiently terminate license renewal proceedings, but only at a time and with restrictions that will minimize the potential for abuse.

33. Our restrictions on settlement payments do not apply where there is a settlement agreement among the incumbent and all of the competing applicants that results in the sale of the station to one of the applicants or where the incumbent dismisses its application. Our purpose in limiting settlement payments is to eliminate the potential for abuse by parties who enter the comparative process for reasons other than to acquire a broadcast license. An incumbent licensee who seeks to renew its license is not in this category of potential abusers. Accordingly, where an incumbent wishes to sell its station to a competing applicant, or dismiss its renewal application in exchange for payment, this does not constitute an abuse of our comparative process. Rather, it serves the public interest to permit an incumbent who, for whatever reason, decides it no longer wishes to operate a broadcast station, to transfer its license or otherwise dismiss its renewal application with no restrictions. Because an uninterested licensee may not have sufficient incentive to expend the resources necessary to provide quality service to the public, the public would be better served by allowing the incumbent to sell or otherwise defer to a qualified applicant who desires to own the station.

34. *Section 311 (d).* The *Second Further Notice* solicited comment on the question of whether and to what extent our ability to place restrictions on settlement payments to competing applicants in a comparative renewal situation is constrained by Section 311(d). At this stage, the issue is whether the particular approach we have chosen -- that is, banning pre-Initial Decision settlement payments and restricting payments thereafter to legitimate and prudent expenses -- is authorized by Section 311(d). Section 311(d) provides that the Commission shall approve a settlement agreement "only if it determines that (A) the agreement is consistent with the public interest, convenience, or necessity; and (B) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement." We find, in accordance with the majority of commenters, that nothing in this language denies the Commission the authority to establish reasonable parameters for when and under what circumstances the public interest would be served by disapproving these agreements. Indeed, the statutory language appears to be clear on its face.[58] As long as the Commission determines that "no party to the agreement filed its application for the purpose of reaching or carrying out such [an] agreement," the Commission has broad authority under Section 3ll(d) to decide whether settlement agreements should be approved or disapproved under the public interest, convenience, and necessity standard. The legislative history on the section is scant; the Conference Report only instructs us that the section was to prevent the filing of "frivolous" applications challenging renewal applicants by parties who offer to withdraw the renewal challenge in exchange for "a payment of money or a transfer of assets."[59]

35. Moreover, nothing in the statutory language or the legislative history suggests that Section 3ll(d) requires the Commission to proceed on an *ad hoc*, case-by-case basis to determine if certain types of settlements are consistent with the public interest or prohibits the Commission from using its rule making powers to make such public interest determinations.[60] It is well established that the Commission may, by rule making, define the public interest as that term is used in the Communications Act.[61] In short, Section 3ll(d) imposes no limitation on the Commission's authority to disapprove settlement agreements provided the Commission adheres to the broad public interest standard.[62] All we have done here is to make a generalized policy judgment, based on our experience and the record in this proceeding, that the public is disserved by any settlement payments from the incumbent to a challenger prior to the Initial Decision, and payments in excess of legitimate and prudent expenses thereafter.

36. We find unpersuasive the position of S.E. Broadcasting that the 1982 amendment of Section 311(c) in the following session of Congress and its legislative history are evidence that the earlier enactment of Section 311(d) was intended to freely permit settlements for consideration.[63] Section 311(c) adopted language identical to Section 311(d) to govern settlements among applicants for new licenses. Prior to the amendment, Section 311(c) had allowed the Commission to approve settlements entered into by competing applicants for new stations only when the Commission had determined that the amount of consideration was "not in excess of the aggregate amount . . . to have been legitimately and prudently expended . . . by such applicant in connection with preparing, filing, and advocating the granting of his application."[64] In explaining the amendment to Section 311(c), the conferees referred to Section 311(d). Specifically, they stated that Section 311(d) was amended to provide that "the Commission shall approve any agreement between applicants where one or more of the applicants agrees to withdraw its application in return for valuable consideration [if] the Commission first . . . determine[s] that the agreement is consistent with the public interest and that no party to the agreement filed its application for the purpose of entering such an agreement."[65] We do not read this passage as meaning that the Commission is compelled to accept settlement agreements regardless of the amount of the payments involved or that we are somehow prevented from placing reasonable restrictions on the timing and amount of such payments in the public interest. The conferees, by their statement, were merely paraphrasing the language in Section 311(d) itself, language that is consistent with our actions here. As emphasized earlier, however, in determining the congressional intent underlying the earlier legislation, we think it is more pertinent to refer to the actual statutory language.

37. Moreover, although Sections 311(c) and (d) contain identical language, the public interest calculus under the two subsections differs substantially. Consequently, settlement payments in a comparative new context may call for a different regulatory treatment than is appropriate in a renewal situation. In the case of new station applicants, there is the strong public interest goal in obtaining new broadcast service as quickly as possible. As long as two or more applicants are in the midst of a comparative hearing, no new service is being provided to the public. Moreover, in the case of two or more applicants for a new authorization, even though both parties may intend to build a station if awarded the license, it is likely that one of the parties may value the license more than the other party. In that situation, it is both efficient and equitable for the Commission to allow a settlement payment without specifying limits on the amount of such a settlement. These considerations are somewhat different in the renewal context. Inasmuch as a station continues to operate during the pendency of a comparative challenge, service to the public is generally not an issue. Consequently, limits on settlements in the renewal context should have no impact on continuity of service. Moreover, because challengers can purchase a station from an incumbent licensee, subject to Commission approval with respect to qualifications, the limits we are adopting on settlements do not prevent the assignment of a license to a qualified challenger if it values the license more highly than the incumbent. Thus, the different public interest considerations applicable in the comparative renewal context warrant limits on the timing and amount of settlements regardless of whether such restrictions are recommended in the comparative new area.

38. In retrospect, given our analysis here, we will no longer adhere to the reasoning in our 1982 decision in *Western Connecticut Broadcasting Co.*,[66] which abolished the so-called *NBC* doctrine. The *NBC* doctrine was established by the Commission to govern the treatment of settlement agreements in comparative renewal cases prior to the enactment of Section 311(d). The doctrine provided that the Commission would approve settlements in the renewal context only in unique and compelling circumstances and, even then, for no more than the legitimate and prudent expenses of the withdrawing party. In *Western Connecticut*, we eliminated that policy, stating that since settlements in the license renewal context would be "reviewed in accordance with relevant statutory provisions [*i.e.*, Section 311(d)]," there was no further need for the *NBC* doctrine. The Commission also noted that any detriment stemming from the settlement, such as the loss of a choice between applicants, was offset by the benefits attributable to the termination of the litigation. The Commission concluded that settlement agreements in comparative renewal cases should be examined in the same manner as in initial licensing proceedings. Now that we have reexamined these issues with the benefit of experience and the extensive record in this proceeding, we believe that our conclusions in *Western Connecticut* did not sufficiently consider other factors that bear on the settlement process, especially the potential for abuse in the comparative renewal context. Accordingly, we depart from our holding in *Western Connecticut* insofar as we adopt herein more restrictive policies for settlement agreements in comparative renewal cases than those that apply in the initial licensing context.

39. *Petitions to Deny*. A person has the statutory right to file a petition to deny to challenge an incumbent licensee's renewal application on the grounds that the licensee lacks qualifications or that the grant of renewal would be inconsistent with the public interest.[67] Petitions to deny in the comparative renewal context are often filed to achieve nonfinancial goals such as to require a licensee to cure a deficiency in its performance, to provide certain types of programming, to continue to consider issues of concern to its community of license, or to improve its employment record regarding minorities and women. Petitions to deny can be dismissed in exchange for the payment of money and/or for promises to implement some type of nonfinancial reform. Where a petition to deny is dismissed in exchange for an agreement by a licensee to implement nonfinancial reforms, such settlements are often referred to as citizens' agreements. Our policy with regard to settlements of petitions to deny depends on whether the petition is dismissed in exchange for money or for a nonfinancial promise.

40. Where a petition to deny is settled in exchange for money, we will allow such payments provided they do not exceed the petitioner's legitimate and prudent expenses in prosecuting its petition. We agree with Capital Cities/ABC, UCC *et al.*, ACT *et al.* and other commenters that we must not discourage the use of petitions to deny in order to further our public interest goals. Petitions to deny play a critical role in our current regulatory scheme.[68] Members of the public, through the use of petitions to deny, serve as private attorneys general in-

forming us of deficiences in the performance of licensees and helping us ensure that licensees serve the public interest.[69]

41. We believe that a legitimate and prudent expense limitation on settlement payments of petitions to deny strikes the appropriate balance between deterring abuse and not discouraging the filing of such petitions. By prohibiting payments in excess of legitimate and prudent expenses we are removing the profit motive for filing petitions to deny. This should help ensure that petitions are filed for legitimate public interest purposes. By permitting recovery of legitimate and prudent expenses, we are preserving the petition to deny process as a monitoring and regulatory tool. It is more likely that individuals or public interest groups will perform their function of informing us of licensee deficiencies if they can maintain hope of recovery of the expenses they incur. To preserve the private attorney general function of petitions to deny, we believe we should provide for the possibility that a petitioner can be made economically whole.

42. The difference in our policies between petitions to deny and competing applications is due to the different functions of the two types of challenges. The goal of a legitimate competing applicant is to obtain a broadcast license. Since this goal cannot be reached before a hearing and a decision by the ALJ (unless the incumbent drops out), prohibiting settlement payments prior to that time helps ensure that competing applicants file for the goal of obtaining an application. In contrast, the primary purpose of a legitimate petition is to achieve a nonfinancial reform, which can occur any time during a renewal proceeding. An incumbent can agree early in the license renewal process to reform its minority hiring practices, for example. Petitioners should be entitled to attorney's fees and costs at any time in the process that deficiencies which stimulated the petition are resolved. Moreover, different incentives apply to the two types of challenges. Competing applicants have the possibility of obtaining a valuable broadcast license as an incentive to file. It is unlikely that *bona fide* applicants would be deterred from this goal merely because, under our new policy, they cannot settle for fees and costs prior to the Initial Decision. Unlike competing applicants who stand to obtain a valuable broadcasting license, parties filing petitions to deny have no corresponding valid economic incentive in carrying out their private attorney general function. Consequently, any restrictions on a petitioner's ability to recover fees and costs may discourage the legitimate use of petitions to deny.

43. *Citizens' Agreements*. A citizens' agreement is a contract in which a petitioner to deny agrees to dismiss its petition in exchange for a promise by the licensee to implement a nonfinancial reform such as a programming or an employment initiative. There are two policy issues related to citizens' agreements before us. The first is whether any limitation should be placed on citizens' agreements reached in settlement of petitions to deny. The second is whether the Commission should continue its current policy of interpreting and enforcing programming components of these private contractual arrangements in accordance with its policy in *Agreements Between Broadcast Licensees and the Public*. [70]

44. Commission policy toward citizens' agreements is an outgrowth of our longstanding policy of encouraging "affirmative dialogue" between broadcast licensees and the residents of their service areas. Such agreements, when entered into in consideration of, or in conjunction with, the withdrawal of a petition to deny, are not, in principle, mechanisms for abuse. Indeed, they provide a vehicle for amicably resolving disputes. However, many of the same concerns regarding potential abuse that motivated our restrictions on money payments in exchange for the withdrawal of petitions to deny appear to be equally applicable to citizens' agreements.

45. Ostensibly "nonfinancial" citizens' agreements often involve financial expenditures by the licensee to implement the reforms promised to the petitioner. Those expenditures may inure to the financial benefit of the petitioner, directly or indirectly. Consequently, these "nonfinancial" agreements can create the potential for abuse. Concessions extracted from the licensee under these agreements can merely be disguised private payoffs for dismissing a license renewal challenge where the petitioner itself, or an affiliated person or entity, is paid to implement the reform.

46. In light of this potential for abuse, we will review all citizens' agreements reached in exchange for dismissing a petition to deny on a case by case basis to determine whether the agreement furthers the public interest. In making this determination, we will presume that any agreement with a petitioner that calls for the *petitioner*, or any person or organization related to the petitioner, to carry out, for a fee, any programming, employment or other "nonfinancial" initiative does not further the public interest and hence will likely be disapproved. As discussed above, this type of arrangement is particularly susceptible to abuse. In contrast, a licensee's agreement with a petitioner to make changes in operations or programming, either *by itself* or through *disinterested third parties* without further participation by the petitioner, will likely be approved.[71] For example, we will regard an agreement to increase minority employment by using, for a fee, the services of *petitioner* or any person or organization related to petitioner, as presumptively contrary to the public interest, and it will likely be disapproved. In contrast, we will regard an agreement to increase the pool of minority applicants for employment by contracting with a third party, completely independent from petitioner, as consistent with the public interest, and it will likely be approved.

47. We note, however, that our general presumption that citizens' agreements in which the petitioner is paid to perform the promised reform are contrary to the public interest can be rebutted by clear and convincing evidence that the arrangement is, in fact, consistent with the public interest. Thus, we would probably find, for example, that where the petitioner is the only entity available that can perform a given service, an agreement to pay petitioner for performing that service would be approved as being consistent with the public interest.

48. The second issue before us concerning citizens' agreements is whether the Commission should remain involved in interpreting and enforcing such agreements. These agreements generally are private contractual matters between a licensee and a citizens' group. Under our current policy, we examine citizens' agreements which are incorporated in applications to the Commission or presented in a complaint or formal request for review. We review them to determine whether they improperly delegate nondelegable licensee responsibilities,[72] improperly

impinge on a licensee's nondelegable discretion, or otherwise violate any applicable rules. We are making no change in this policy.

49. We have also become involved, however, in the interpretation and enforcement of agreements filed at the Commission. We have regarded promises of future performance as commitments to the agency, and we have relied upon these commitments in our decision making process. We intend, as we have in the past, to take commitments to the agency that are relevant to our decision making process seriously. However, matters that are not germane to our decision making process do not become subject to agency enforcement simply because they are included in an agreement that is filed with us. The principal area where this has present relevance concerns agreements touching on programming matters. Over the course of the last decade we have eliminated detailed programmming proposals from our processes, including our renewal application. For what we believe are good and valid reasons, we no longer apply a "promise versus performance" standard to renewal applications. Accordingly, unless an action taken by the Commission is specifically conditioned on licensee representations relating to programming matters, we do not intend to enforce private contractual agreements relating to programming.

50. Finally, we believe it important to emphasize once again that a private settlement through the withdrawal of an agreement or otherwise does not necessarily dispose of issues that have been raised. If a petition contains specific allegations of fact sufficient to raise a substantial and material question of fact as to whether the applicant is qualified, the Commission must address and resolve such a question regardless of any agreement among the parties.[73]

51. *Enforcement.* In order to aid with the enforcement of the policies articulated above, we are adopting the disclosure and certification requirements set forth below.

52. Should any applicant in a license renewal proceeding, except an incumbent, seek to dismiss an application pending before the Commission[74] prior to the Initial Decision, each party to the proceeding must submit to the Commission a copy of any written agreement related to the dismissal of the application. Each party must also submit an affidavit:

> (1) certifying that it has not received or paid and it will not receive or pay any money or other consideration in connection with the dismissal;
>
> (2) disclosing the terms of any oral agreements related to the dismissal; and
>
> (3) certifying that its application was not filed for the purpose of reaching or carrying out an agreement with any other party.

53. Should any applicant in a license renewal proceeding, except an incumbent, enter into an agreement after the Initial Decision, to dismiss an application pending before the Commission in exchange for payment, all parties to the agreement must file a joint request for approval accompanied by a copy of the agreement and an affidavit from each party:

> (1) certifying that it has not received or paid and it will not receive or pay any money in exchange for the dismissal of the application in excess of the legitimate and prudent expenses incurred by the applicant seeking dismissal;
>
> (2) disclosing the exact amount of any money paid or promised to the applicant seeking dismissal;
>
> (3) disclosing the terms of any oral agreement related to the dismissal; and
>
> (4) certifying that its application was not filed for the purpose of reaching or carrying out an agreement with any other party.

Any party seeking reimbursement of expenses under the agreement must also submit an itemized accounting of its expenses incurred in preparing, filing, and prosecuting its application for which reimbursement is sought.

54. Each of these disclosure and certification requirements will enable the Commission to enforce the policies set out herein. These reporting requirements should disclose whether any applicant seeking to withdraw an application prior to the Initial Decision has received, or will receive, money in connection with the withdrawal and whether there are any written or oral understandings related to the dismissal that would undermine our restrictions. This is necessary to enforce our pre-Initial Decision ban on payment. These reporting requirements should also disclose whether any applicant seeking to withdraw an application after the Initial Decision has received, or will receive, any money in excess of legitimate and prudent expenses, whether there are any oral understandings related to the withdrawal that would undermine our restrictions, and the information needed to verify the expenses for which the applicant is seeking reimbursement. This is necessary to enforce our post-Initial Decision limitation on settlement payments to legitimate and prudent expenses. Finally, the last certification in each category is required under Section 3ll(d) of the Act.

55. Where a petitioner to deny seeks to dismiss a petition filed against a license renewal application or any competing applications, each party to the petition (the petitioner and the party or parties against whom petitions were filed) must submit a copy of any written agreement relating to the dismissal and an affidavit:

> (l) certifying that it has not received or paid and it will not receive or pay any money in exchange for the dismissal of the petition to deny in excess of legitimate and prudent expenses incurred by the petitioner seeking dismissal;
>
> (2) disclosing the exact nature and amount of any money or other consideration[75] paid or promised in connection with the dismissal of the petition to deny; and
>
> (3) disclosing the terms of any oral agreement related to the dismissal of the petition to deny.

Any petitioner seeking reimbursement of expenses under the agreement must also submit an itemized accounting of its expenses incurred in preparing, filing, and prosecuting its petition for which reimbursement is sought.

56. These requirements should disclose whether petitioner has received, or will receive, any money in excess of legitimate and prudent expenses, whether petitioner has been promised any nonfinancial concessions, whether there is any oral agreement or understanding that would violate our restrictions on settlement payments or citizens' agreements, and the information needed to verify the expenses for which the petitioner is seeking reimbursement.

57. Finally, if a petitioner to deny seeks to dismiss a petition filed against a license renewal application or any competing application in exchange for a citizens' agreement all parties to any such agreement must jointly submit a copy of the agreement to the Commission for approval under our policies in ¶¶ 46-47.

58. To implement these requirements we are hereby amending our rules as outlined in Appendix B. We intend to enforce our policies and rules using the full panoply of penalties available against all persons who fail to comply. Accordingly, any licensee who fails to provide accurate documentation, information or certification as required by our amended rules will also be in violation of Sections 73.1015 and 73.3513(d) of our rules, will be subject to revocation of their license under Section 312, to fines under Section 502 and to forfeiture under Section 503(b) of the Communications Act, and to prosecution for misrepresentation of a material fact under 18 U.S.C. §1001. Competing applicants who fail to provide accurate documentation, information or certification as required by our amended rules will also be in violation of Sections 73.1015 and 73.3513(d) of our rules, will be subject to fines under Section 502 and to forfeiture under Section 503 of the Communications Act, and to prosecution for misrepresentation under 18 U.S.C. §1001. Finally, petitioners who fail to provide accurate certification as required by our amended rules will also be in violation of Section 1.16 and will be subject to prosecution for misrepresentation under 18 U.S.C. §1001.

59. *Effective Date*. The policies and rules adopted herein will become on June 28, 1989, subject to Office of Management and Budget ("OMB") approval pursuant to the Paperwork Reduction Act of 1980. With regard to competing applications, the new policies and rules will apply to all competing applications pending before the Commission as of the effective date of this *Report and Order*, except those applications that have been designated for a hearing as of the effective date ("post-designation" applications). Settlements of post-designation applications will be governed by the current policies and rules even if they are reached after the effective day of this *Report and Order*. Settlements of any pending competing applications submitted to the Commission for approval prior to the effective date of this *Report and Order* likewise will be governed by the current policies and rules.

60. With regard to petitions to deny, the new policies and rules will apply to all petitions to deny pending before the Commission as of the effective date of this *Report and Order*, subject to OMB approval, except those petitions in which one or more allegations raised in the petition has been designated for a hearing. Petitions to deny at a post-designation stage of processing will be governed by the current policies and rules even if they are settled after the effective date of this *Report and Order*. Settlements of any pending petitions to deny reached prior to the effective date of this *Report and Order* likewise will be governed by the current policies and rules. Accordingly, such settlements, including settlements in the form of citizens' agreements, need not be presented to the Commission for approval.

61. It is important to the public interest to implement these policy and rule changes as expeditiously and broadly as possible. We have identified potential abuse of our process as a serious problem that requires prompt attention. The need for action is intensified by the fact that we have already begun a new cycle of broadcast renewals after a hiatus created by the statutory lengthening of license terms. Precisely because we believe our new policies and rules will be a significant step toward eradicating abuse of our process, it serves the public interest to apply them to existing as well as prospective applicants and petitioners as quickly as possible.

62. We are not imposing these policy changes on post-designation applicants or petitioners to avoid possible hardship to these challengers. They have relied on prior Commission policies and rules to begin the hearing process which typically involves a considerable expenditure of money and time. Permitting these applicants and petitioners to be governed by our current rules will ensure that they are not prejudiced by our policy and rule changes. In contrast, pre-designation applicants have neither begun litigating in reliance upon previous policies nor have they typically spent significant amounts of time or money in advancing an application or petition. Thus, there is little likelihood that a change in policies and rules will cause them injury. In any event, the public interest benefits resulting from the immediate application of our new policies and rules outweigh any conceivable adverse affects on such challengers.[76] For similar reasons, we are not imposing these policy changes on applicants that have filed settlement agreements with the Commission prior to the effective date of this *Report and Order*.

III. CAMERON POLICY

63. *Background*. Under Commission policy, when an applicant proposes a site for its transmitting antenna in a construction application, it must have reasonable assurance that the site will be available to it.[77] In *George E. Cameron Jr. Communications*,[78] we stated we would presume that an incumbent's transmitter site would be available to a successful challenger in a comparative renewal proceeding. Accordingly, under current policy, we do not consider as an issue in a comparative hearing an incumbent's assertion that it will deny competing applicants use of its transmitter if its application is denied. We established this conclusive presumption to prevent an incumbent from representing that its site is not available merely to create a potentially disqualifying issue against its challengers. We believed this solution would, among other things, eliminate time-consuming inquiries into the site availability question.

64. In our *Second Further Notice*, however, we expressed the view that the *Cameron* presumption, in conjunction with other relaxed filing requirements, could also facilitate the filing of non *bona fide* competing applications. Specifically, we stated our concern that the presumption permits renewal challengers merely to clone technical proposals submitted by renewal applicants, rather than submit independent technical qualifications, thereby making it substantially easier and less expensive for applicants to file. Accordingly, we requested comment on eliminating or relaxing the *Cameron* presumption.

65. *Comments*. All commenters who addressed the issue advocate elimination of the *Cameron* presumption.[79] Generally, commenters argue that the presumption facilitates the filing of sham applications by permitting non *bona fide* challengers to merely clone an incumbent's engineering proposal. They further assert that an independent technical showing is a critical basis for comparing competing applicants and it is not unreasonable to require a challenger to make such a showing. Without it, they argue, there is no assurance that a prevailing challenger could acquire a site without interruption of service to the public.

66. *Discussion*. We find, based upon the comments and our experience with the *Cameron* presumption, that continued retention of the presumption would not serve the public interest and it should therefore be eliminated. By permitting renewal challengers to assume availability of the incumbent's transmitter site and thereby to simply copy the incumbent's engineering proposal, we are making it possible for non *bona fide* challengers to avoid comparison based on their own engineering qualifications and technical proposals. We do not now require a competing applicant to locate a site, obtain reasonable assurance that the site will be available, or make an independent showing of its technical qualifications. As a result, the absence of such requirements, involving some up front costs in terms of time and money, makes it more economically attractive for bogus challengers to file merely to elicit a settlement. To require a competing applicant to locate an available site and develop its own technical proposal may, in conjunction with our other strengthened filing requirements, help to deter sham applicants and permit a more complete comparison.

67. Moreover, we believe that such a requirement is reasonable and will improve the comparative process. In many instances, an incumbent licensee does not own a transmitter site but rather leases it from an independent third party. It is not unreasonable to require a challenger to make contingent arrangements with the site owner to lease the site should its application be granted. If an incumbent owns a transmitter site and represents that the site is not available, it is not unreasonable in most circumstances to require a challenger to identify an alternative transmitter site. Generally, there are a number of sites in a given community of license or broadcast area that would be appropriate for an antenna. The difficulty arises where a transmitter site is the only feasible location for an antenna in the community of license or broadcast area, the incumbent owns the site, and the incumbent represents that the site will not be available if it loses its license. Our experience leads us to conclude that these three factors do not converge frequently enough to justify a presumption which we now believe facilitates abuse of our license renewal process. Under these circumstances, a competing applicant must state on the application that it does not have reasonable assurance that the site will be available, in which case the staff will designate site availability as an issue in the comparativc hearing. The ALJ will then resolve the issue based upon the evidence presented.[80]

68. Moreover, our experience has demonstrated, consistent with the comments, that the presumption is simply unrealistic. For example, if a transmitter is located on valuable real estate, the lessor or incumbent could have the *bona fide* intention of leasing or selling it to developers for any number of non-broadcast uses. It disserves the public to permit a challenger to assume the availability of a site and, in the process, avoid subjecting its own engineering proposal to comparative evaluation when, in fact, the site may not be available. This could leave a prevailing challenger without a site, resulting in interruption of service to the public. Experience has also demonstrated that the presumption operates unfairly to neutralize an advantage in the comparative process that the incumbent has earned. Under the *Cameron* presumption, incumbents who found a site, built a transmitter, developed an engineering proposal geared to that site, and successfully transmitted from the site received no credit or advantage for this capability.

69. For these reasons, we will no longer apply the *Cameron* presumption. If a renewal challenger is unable to provide reasonable assurance of transmitter site availiabity this will be designated as an issue in the comparative hearing. While we recognize that an inquiry into site availability may require additional time and resources, we believe that this potential disadvantage is far outweighed by the benefits of eliminating the policy.

70. The *Cameron* policy change will become effective on June 28, 1989, subject to OMB approval. For the same reasons stated in paragraphs 61 - 62 above, the policy change will apply to all prospective competing applications and all applications pending before the Commission as of the effective date of this *Report and Order* that have not been designated for a hearing as of the effective date ("pre-designation applicants"). The policy will not apply to applications pending before the Commission that have been designated for a hearing as of the effective date ("post-designation applications"). All pre-designation applicants who have relied upon the availability of the incumbent's transmitter site in their application will have until July 28, 1989, 30 days from the effective date, subject to OMB approval, to amend their application to show reasonable assurance of site availability as required in Section VII of FCC Form 301 and, if necessary, to amend the engineering data submitted.

IV. CONCLUSION

71. The policy revisions set out in this *Report and Order* constitute a significant step toward our goal of eliminating the opportunities, incentives, and mechanisms for abuse of our comparative renewal process. By placing limitations as to time and amount on payments that can be made in exchange for withdrawing competing applications and petitions to deny, we are removing the profit incentive for filing these challenges. Competing applicants and petitioners can no longer file challenges to license renewals for the non-legitimate purpose of extorting a large money settlement. Removing this profit incentive should significantly discourage non *bona fide* challenges. By eliminating the *Cameron* doctrine, we are changing a policy we now believe facilitated the filing of non *bona fide* competing applications. Our new policy should help ensure that only fully qualified applicants with reasonable assurance of site availability can participate in a comparative hearing.

72. These reforms, along with our amendments to Form 301,[81] as well as our continued efforts to devise clearer, more meaningful comparative criteria,[82] should significantly advance our overall goal of providing for meaningful hearings among *bona fide* applicants, devoid of opportunities for abuse of our process.

PROCEDURAL MATTERS

73. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's Final Regulatory Flexibility Analysis is contained in Appendix C.

74. The Secretary shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981)).

PAPERWORK REDUCTION ACT STATEMENT

75. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified information collection requirements on the public. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

ORDERING CLAUSES

76. Authority for the rule changes adopted herein is contained in Section 4(i) and (j), and 301, 303, 308 and 309 of the Communications Act of 1934, as amended.

77. Accordingly, it is ORDERED that the policies and the amendments to the Commission's Rules and Regulations adopted herein, as set forth in Appendix B, attached hereto, shall become effective on June 28, 1989, subject to Office of Management and Budget approval.

78. IT IS FURTHER ORDERED THAT the portions of this proceeding related to the renewal expectancy factor and the comparative renewal criteria (Parts III, IV and V of the *Second Further Notice)* are held open pending further comment on these issues pursuant to a *Third Further Notice of Inquiry and Notice of Proposed Rule Making* in this proceeding.

79. IT IS FURTHER ORDERED THAT the part of this proceeding related to amendments to FCC Form 301 (paragraphs 25-29 of the *Second Further Notice),* the policies related thereto, and the comments and reply comments received in response thereto are incorporated into General Docket No. 88-328 for resolution.

80. IT IS FURTHER ORDERED THAT, except as specified in Paragraphs 78 - 79, this proceeding is TERMINATED.

81. For further information on this proceeding, contact William H. Johnson, Mass Media Bureau, (202) 632-6460 or Marilyn Mohrman-Gillis, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

LIST OF COMMENTERS

1. Action For Children's Television; Media Access Project; and Henry Geller and Donna Lampert

2. American Women in Radio and Television

3. Association of Independent Television Stations, Inc.

4. Barnstable Broadcasting Affiliates

5. Capitol Broadcasting Corporation; Garamella Broadcasting Company; Goltrin Acquisition Partnership; Infinity Broadcasting Corporation; Ralph C. Wilson Industries, Inc.; Shamrock Broadcasting, Inc.; South Fork Broadcasting Corp.; and WAHR, Inc.

6. CBS Inc.

7. Cox Enterprises, Inc.; and Diversified Communications

8. Fuller-Jeffrey Broadcast Companies

9. Great American Television and Radio Company, Inc.

10. Greater Media, Inc.

11. Leibowitz & Spencer; Florida Association of Broadcasters; Georgia Association of Broadcasters Inc.; Missouri Broadcasters Association; Nebraska Broadcasters Association; New York State Broadcasters Association, Inc.; Southwest Florida Broadcasters Association; South Florida Radio Broadcasters Association; Fort Myers Broadcasting Company; Greater Pacific Radio Exchange, Inc.; Guy Gannett Publishing Co.; Highlands Media Company, Inc.; John H. Phipps, Inc.; Radio WADO, Inc.; Southern Broadcast Corporation of Sarasota; S.R. Associates, Inc.; Sunshine Wireless Co., Inc.; and TK Communications, Inc.

12. Metroplex Communications, Inc.

13. Midwest Television, Inc.; and The Providence Journal Company

14. National Association of Broadcasters

15. National Broadcasting Company, Inc.

16. National Hispanic Media Coalition

17. Office of Communication of the United Church of Christ; National Association for Better Broadcasting; Telecommunications Research and Action Center; Black Citizens for a Fair Media; Chinese for Affirmative Action; League of United Latin American Citizens; and NOW Legal Defense and Education Fund

18. Orr & Earles Broadcasting, Inc.

19. Peper, Martin, Jensen, Maichel and Hetlage

20. Post-Newsweek Stations, Inc.

21. RKO General, Inc.

22. Southeast Broadcasting Limited Partnership; and Garden State Broadcasting Limited Partnership

23. Television Operators Caucus, Inc.

24. United States Catholic Conference

25. Univision Station Group, Inc.

26. Westinghouse Broadcasting Company, Inc.

27. WWOR-TV, Inc.

LIST OF REPLY COMMENTERS

1. A.H. Belo Corporation

2. Capitol Broadcasting Corporation; Garamella Broadcasting Company; Goltrin Acquisition Partnership; Infinity Broadcasting Corporation; Ralph C. Wilson Industries, Inc.; Shamrock Broadcasting, Inc.; South Fork Broadcasting Corp.; and WAHR, Inc.

3. Capital Cities/ABC, Inc.

4. Leibowitz & Spencer; Florida Association of Broadcasters; Georgia Association of Broadcasters Inc.; Missouri Broadcasters Association; Nebraska Broadcasters Association; Southwest Florida Broadcasters Association; South Florida Radio Broadcasters Association; Fort Myers Broadcasting Company; Greater Pacific Radio Exchange, Inc.; Guy Gannett Publishing Co.; Highlands Media Company, Inc.; John H. Phipps, Inc.; Radio WADO, Inc.; Southern Broadcast Corporation of Sarasota; S.R. Associates, Inc.; Sunshine Wireless Co., Inc.; and TK Communications, Inc.

5. Metroplex Communications, Inc.

6. National Association of Broadcasters

7. National Black Media Coalition

8. New York State Broadcasters Association, Inc.

9. Office of Communication of the United Church of Christ; National Association for Better Broadcasting; Telecommunications Research and Action Center; Black Citizens for a Fair Media; Chinese for Affirmative Action; League of United Latin American Citizens; and NOW Legal Defense and Education Fund

10. Southeast Florida Broadcasting Limited Partnership; and Garden State Broadcasting Limited Partnership

APPENDIX B

1. Section 73.3523 is added to 47 C.F.R. Part 73 to read as follows:

Section 73.3523. Dismissal of applications in renewal proceedings.

(a) Any applicant for a construction permit, that has filed an application that is mutually exclusive with an application for the renewal of a license of an AM, FM or television station (hereinafter "competing applicant"), and seeks to dismiss or withdraw its application and thereby remove a conflict between applications pending before the Commission, must obtain the approval of the Commission.

(b) If a competing applicant seeks to dismiss or withdraw its application prior to the Initial Decision stage of the hearing on its application, it must submit to the Commission a request for approval of the dismissal or withdrawal of its application, a copy of any written agreement related to the dismissal or withdrawal of its application, and an affidavit setting forth:

(1) A certification that neither the applicant nor its principals has received or will receive any money or other consideration in exchange for dismissing or withdrawing its application;

(2) A statement that its application was not filed for the purpose of reaching or carrying out an agreement with any other applicant regarding the dismissal or withdrawal of its application; and

(3) The terms of any oral agreement relating to the dismissal or withdrawal of its application.

In addition, within 5 days of the applicant's request for approval, each remaining competing applicant and the renewal applicant must submit an affidavit setting forth:

(4) A certification that neither the applicant nor its principals has paid or will pay any money or other consideration in exchange for the dismissal or withdrawal of the application; and

(5) The terms of any oral agreement relating to the dismissal or withdrawal of the application.

(c) If a competing applicant seeks to dismiss or withdraw its application after the Initial Decision stage of the hearing on its application, it must submit to the Commission a request for approval of the dismissal or withdrawal of its application, a copy of any written agreement related to the dismissal or withdrawal, and an affidavit setting forth:

(1) A certification that neither the applicant nor its principals has received or will receive any money or other consideration in excess of the legitimate and prudent expenses of the applicant;

(2) The exact nature and amount of any consideration paid or promised;

(3) An itemized accounting of the expenses for which it seeks reimbursement;

(4) A statement that its application was not filed for the purpose of reaching or carrying out an agreement with any other applicant regarding the dismissal or withdrawal of its application; and

(5) The terms of any oral agreement relating to the dismissal or withdrawal of its application.

In addition, within 5 days of the applicant's request for approval, each remaining party to any written or oral agreement must submit an affidavit setting forth:

(6) A certification that neither the applicant nor its principals has paid or will pay money or other consideration in excess of the legitimate and prudent expenses of the withdrawing applicant in exchange for the dismissal or withdrawal of the application; and

(7) The terms of any oral agreement relating the dismissal or withdrawal of the application.

(d) For the purposes of this section:

(1) Affidavits filed pursuant to this section shall be executed by the applicant, permittee or licensee, if an individual; a partner having personal knowledge of the facts, if a partnership; or an officer having personal knowledge of the facts, if a corporation or association.

(2) An application shall be deemed to be pending before the Commission from the time an application is filed with Commission until an order of the Commission granting or denying the application is no longer subject to reconsideration by the Commission or to review by any court.

(3) "Legitimate and prudent expenses" are those expenses reasonably incurred by an applicant in preparing, filing, and prosecuting its application.

(4) "Other consideration" consists of financial concessions, including but not limited to the transfer of assets or the provision of tangible pecuniary benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

2. Section 73.3524 is added to 47 C.F.R. Part 73 to read as follows:

Section 73.3524. Dismissal of petitions to deny in renewal proceedings.

(a) Whenever a petition to deny has been filed against any application for the renewal of a license for an AM, FM, or television station, or against a construction permit application that is mutually exclusive with a renewal application, and the petitioner seeks to dismiss or withdraw the petition to deny, either unilaterally or in exchange for financial consideration, the petitioner must file with the Commission a request for approval of the dismissal or withdrawal, a copy of any written agreement related to the dismissal or withdrawal, and an affidavit setting forth:

(1) A certification that neither the petitioner nor its principals has received or will receive any money or other consideration in excess of legitimate and prudent expenses in exchange for the dismissal or withdrawal of the petition to deny;

(2) The exact nature and amount of any consideration received or promised;

(3) An itemized accounting of the expenses for which it seeks reimbursement; and

(4) The terms of any oral agreement related to the dismissal or withdrawal of the petition to deny.

In addition, within 5 days of petitioner's request for approval, each remaining party to any written or oral agreement must submit an affidavit setting forth:

(5) A certification that neither the applicant nor its principals has paid or will pay money or other consideration in excess of the legitimate and prudent expenses of the petitioner in exchange for dismissing or withdrawing the petition to deny; and

(6) The terms of any oral agreement relating to the dismissal or withdrawal of the petition to deny.

(b) Citizens' agreements. Whenever a petition to deny has been filed against any application for the renewal of a license for an AM, FM, or television station, or against a construction permit application that is mutually exclusive with a renewal application, and the petitioner seeks to dismiss or withdraw the petition to deny in exchange for non-financial consideration (*e.g.*, programming, ascertainment or employment initiatives), this is referred to as a citizens' agreement. The parties to the agreement must file with the Commission a joint request for approval of the citizens' agreement, a copy of any written agreement, and an affidavit executed by each party setting forth:

(1) Certification that neither the petitioner, nor any person or organization related to the petitioner, has received or will receive any money or other consideration in connection with the citizens' agreement other than legitimate and prudent expenses incurred in prosecuting the petition to deny;

(2) Certification that neither the petitioner, nor any person or organization related to petitioner is or will be involved in carrying out, for a fee, any programming, ascertainment, employment or other non-financial initiative referred to in the citizens' agreement; and

(3) The terms of any oral agreement.

(c) For the purposes of this section:

(1) Affidavits filed pursuant to this section shall be executed by the applicant, permittee or licensee, if an individual; a partner having personal knowledge of the facts, if a partnership; or an officer having personal knowledge of the facts, if a corporation or association.

(2) A petition shall be deemed to be pending before the Commission from the time a petition is filed with Commission until an order of the Commission granting or denying the petition is no longer subject to reconsideration by the Commission or to review by any court.

(3) "Legitimate and prudent expenses" are those expenses reasonably incurred by a petitioner in preparing, filing, and prosecuting its petition for which reimbursement is being sought.

(4) "Other consideration" consists of financial concessions, including but not limited to the transfer of assets or the provision of tangible pecuniary benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

3. Section 73.3525 is amended by revising the first sentence of paragraph (a) as follows:

Section 73.3525. Agreements for removing application conflicts.

(a) Except as provided in Section 73.3523 regarding dismissal of applications in comparative renewal proceedings, * * *

* * * * *

4. Section 73.3568 is amended by revising the first sentence of paragraph (a) and the first sentence of paragraph (c) as follows:

Section 73.3568. Dismissal of applications.

(a) Subject to the provisions of Section 73.3523 (Dismissal of applications in renewal proceedings) and Section 73.3525 (Agreements for removing application conflicts), any application may, upon request of the applicant be dismissed without prejudice as a matter of right prior to the designation of such application for hearing.

* * * * *

(c) Subject to the provisions of Section 73.3523 (Dismissal of applications in renewal proceedings) and Section 73.3525 (Agreements for removing application conflicts), requests to dismiss an application without prejudice after it has been designated for hearing will be considered only upon written petition properly served upon all parties of record.

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APPENDIX C

FINAL REGULATORY FLEXIBILITY ANALYSIS

I. Need and Purpose of this Action:

The goal of this action is to eliminate the opportunities, incentives and mechanisms for abusing our license renewal process.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:

No comments were received which related to the Initial Regulatory Flexibility Analysis.

III. Significant Alternatives Considered and Rejected:

We hereby take a number of actions to reform the comparative renewal process. First, we are banning all payments to non-incumbent competing applicants made in exchange for withdrawing competing applications prior to the Initial Decision stage of a hearing, and limiting payments made thereafter to legitimate and prudent expenses. The record demonstrates that there is the clear potential for abuse of our process, and that we need to reduce the potential for abuse to further the public interest. We find that banning all pre-Initial Decision payments and restricting all post-Initial Decision payments to legitimate and prudent expenses is the most effective way to curb abusive competing applications without discouraging *bona fide* applications. We rejected the option of banning payments completely because we believed this would discourage legitimate applicants, and would not permit efficient settlements of applications. We rejected the option of permitting recovery of legitimate and prudent expenses at any time during the process to help ensure that only serious applicants enter the process. By limiting recovery of legitimate and prudent expenses to the post-Initial Decision stage, we hope to weed out weak applicants who could previously file no-risk, no-cost applications, knowing they could generally recover fees and costs at any time. Finally, we rejected the option of imposing no limits because this does not address the serious problem of abuse of our process.

Second, we are limiting payments that can be made in exchange for dismissing petitions to deny to legitimate and prudent expenses. We believe that restricting payments to legitimate and prudent expenses will eliminate the primary incentive for filing abusive petitions without impeding their use to further the public interest. In so doing, we rejected the option of banning all payments. We were concerned that banning the recovery of legitimate and prudent expenses may discourage persons from filing petitions to deny, and thereby undermine the important monitoring role such petitions play in our regulatory scheme. We also rejected the option of imposing no limits on payments because that option did not address the serious problem of abuse of our process.

Third, we are eliminating the *Cameron* doctrine, a policy which permitted competing applicants to assume that an incumbent's transmitter site would be available in the event the challenger prevailed. In so doing, we rejected options of retaining the *Cameron* doctrine or modifying its application. We rejected these options because we found that the *Cameron* doctrine (1) facilitates the filing of non *bona fide* applications; (2) is unrealistic and may disserve the public interest; and (3) operates unfairly to neutralize an advantage in the comparative hearing that an incumbent has earned. We found further that requiring a competing applicant to demonstrate reasonable assurance of site availability is generally not unreasonable.

FOOTNOTES

[1] *Notice of Inquiry in BC Docket No. 81-742*, 88 FCC 2d 120 (1981) ("*Notice*"); *see also Further Notice of Inquiry in BC Docket No. 81-742*, 47 Fed. Reg. 4617 (released Oct. 1, 1982) ("*Further Notice*").

[2] *Second Further Notice of Inquiry and Notice of Proposed Rule Making in BC Docket No. 81-742*, 3 FCC Rcd 5179 (released Aug. 16, 1988) ("*Second Further Notice*").

[3] The term "abuse of process" can be generally defined as the use of a Commission process, procedure, or rule to achieve a result which that process, procedure, or rule was not designed or intended to achieve or, alternatively, use of such process, procedure, or rule in a manner which subverts the underlying intended purpose of that process, procedure, or rule. Our use of this term here is, in general, confined to abuse of process arising from the filing of competing applications and petitions to deny.

[4] *Report and Order in Gen. Docket No. 88-328 (Revision of Application for Construction Permit for Commercial Broadcast Station)*, FCC 89-110,- FCC Rcd - (released April 20, 1989) ("*Form 301 Report and Order*").

[5] *Third Further Notice of Inquiry and Notice of Proposed Rule making in BC Docket No. 81-742*, FCC No. 89-109, - FCC Rcd (adopted March 30, 1989) ("*Third Further - Notice*").

[6] *See Notice of Proposed Rule Making in MM Docket No. 87-314*, 2 FCC Rcd 5563 (1987).

[7] We recognized that the abuse issues raised in MM Docket No. 87-314 also relate extensively to matters outside the renewal process and stated that we would act on such issues at a later date. *See Second Further Notice*, 3 FCC Rcd at 5180 n. 15.

[8] *See* 47 C.F.R. §73.3516(e) (1987).

[9] *See Citizens Communications Center v. FCC*, 447 F.2d 1201, 1211 (D.C. Cir. 1971) ("*Citizens I*") *clarified*, 463 F.2d 822 (D.C. Cir. 1972) ("*Citizens II*").

[10] 47 U.S.C. §311(d)(1).

[11] 47 U.S.C. §311(d)(3).

[12] 47 U.S.C. §309(d).

[13] *See* 47 C.F.R. §73.3584. A petition to deny may also be filed against applications for transfers and assignments of construction permits or station licenses. Abuses in relation to such petitions are beyond the scope of this proceeding and will be dealt with in our general abuse proceeding (MM Docket No. 87-314).

[14] *Faulkner Radio, Inc. v. FCC*, 557 F.2d 866, 875 (D.C. Cir. 1977).

[15] *See Agreements Between Broadcast Licensees and the Public*, 57 FCC 2d 42, 54 (1975).

[16] From 1963 until 1982, pursuant to what became known as the NBC Doctrine, we would not ordinarily approve settlements of competing applications in the renewal context except (1) in unique and compelling circumstances, and (2) for no more than the legitimate and prudent expenses of the withdrawing party. *See National Broadcasting Co., Inc.*, 25 RR 67 (1963). In 1981, Congress amended Section 311(d) of the Act by adding the language set out in paragraph 8 *supra* governing Commission approval of settlements of competing applications. In *Western Connecticut Broadcasting Co.*, 88 FCC 2d 1492, 1497 (1982), we found that there was no further need for our NBC Doctrine as a result of the amendment to Section 311(d). *See* ¶ 38, *infra*, for a discussion of this change in policy.

[17] *See Revision of Application for Construction Permit for Commercial Broadcast Station*, 50 RR 2d 381 (1981).

[18] *See Second Further Notice* at ¶¶ 14-39.

[19] *See* Comments of Action for Children's Television, filed jointly with Media Access Project and Henry Geller and Donna Lampert ("ACT *et al.*"); Capital Broadcasting Corporation *et al.* ("CBC *et al.*"); CBS, Inc.; Cox Enterprises, Inc. and Diversified Communications ("Cox"); Fuller-Jeffrey Broadcast Companies ("Fuller-Jeffrey"); Great American Television and Radio Company, Inc. ("Great American"); Leibowitz & Spencer, *et al.*; Metroplex Communications, Inc. ("Metroplex"); Midwest Television, Inc. and The Providence Journal Company ("Midwest"); National Association of Broadcasters ("NAB"); Office of Communication of the United Church of Christ filed jointly with National Association for Better Broadcasting, Telecommunications Research and Action Center, Black Citizens for a Fair Media, Chinese for Affirmative Action, League of United Latin American Citizens, and NOW Legal Defense and Education Fund ("UCC *et al.*"); Peper, Martin, Jensen, Maichel and Hetlage ("Peper Martin"); Post-Newsweek Stations, Inc. ("Post-Newsweek"); Television Operators Caucus, Inc. ("TOC"); Univision Station Group, Inc. ("Univision"); Westinghouse Broadcasting Company, Inc. ("Group W"); and WWOR-TV, Inc. *See* Reply Comments of A.H. Belo Corp. ("Belo") and Capital Cities/ABC Inc. *See* Appendix A for a list of all commenters and reply commenters in BC Docket 81-742. In addition, eight comments and reply comments were filed in MM Docket 87-314 that have also been reviewed in reaching our decision herein.

[20] *See* Comments of S.E. Broadcasting at 8-20.

[21] *See* Comments of NAB at 22, CBC *et al.* at 10, CBS at 14-22, ACT *et al.* at 15, UCC *et al.* at 44, Liebowitz & Spencer at 8, Cox at 6 and Great American at 8 n.2. *See* Reply Comments of Capital Cities/ABC at 4.

[22] *See* Comments of S.E. Broadcasting at 17, AWRT at 4, and NHMC at 5.

[23] *See* n. 19 *supra*.

[24] Great American, Midwest, Peper Martin, and Univision.

[25] While the *UCC et al.* support the "legitimate and prudent expense" standard, it asserts that the Commission's definition of abuse as extracting financial or *other consideration* is too broad. The *UCC et al.* advocate confining the definition of abuse to "the extraction of financial concessions in the form of money, the transfer of assets, or the provision of any item of tangible pecuniary benefit" to the challenger. Comments of *UCC et al.* at 36. They argue that extracting *non-financial* concessions, such as programming or employment agreements, is the legitimate object of dialogue between citizens and licensees and should be permitted. *Id.* at 35-36.

[26] *See, e.g.*, Comments of CBS at 10-11, UCC *et al.* at 45.

[27] *See, e.g.*, Comments of CBS at 10-11; Great American at 8.

[28] *See* List of commenters, App. A.

[29] Belo, Cox, Fuller-Jeffrey, Post-Newsweek, and Group W.

[30] *See* Comments of NAB at 19-20, Leibowitz & Spencer at 5-9, and Group W at 13-14.

[31] *See* Comments of CBC *et al.* at 7-9.

[32] *See* Comments of Group W at 14.

[33] *See* Comments of UCC *et al.* at 37.

[34] *See* Comments of ACT *et al.* at 15.

[35] *See* Comments of CBC *et al.*, Cox, Fuller-Jeffrey, Great American, Leibowitz & Spencer, *et al.*, Midwest, NAB, UCC *et al.*, Peper Martin, Post-Newsweek, TOC, Univision, and Group W.

[36] *See* ¶¶ 16-18 *supra*.

[37] Comments of ACT *et al.* at 16, and Reply Comments of Capital Cities/ABC at 8-10 and NBMC at 3-4.

[38] *See* Comments of AWRT at 3. CBS, which supports limiting payments to legitimate and prudent expenses for settlements of competing applications, states no position with regard to petitions to deny.

[39] CBC *et al.*, UCC *et al.*, ACT *et al.*, NHMC and NBMC (in a separate reply).

[40] Comments of UCC *et al.* at 38-39.

[41] *Id.* at 39-40.

[42] Comments of CBC *et al.* at 12. CBC cites as an example of a payment that should be allowed, the payment by a broadcaster to a college to establish a minority student internship program. *Id.* at 13.

[43] *See, e.g., United Broadcasting Co. of Eastern Maryland, Inc.*, FCC 85R-83 (released October 10, 1985) ($400,000 settlement paid to opposing applicant in an FM renewal); *United Broadcasting Company of New York, Inc.*, FCC 85R-81 (released October 7, 1985) ($240,000 paid to competing applicant in settlement of

AM renewal); and *Western Broadcasting, Inc.*, FCC 86M-3434 (released November 24, 1986) ($75,000 for dismissal and 198,000 for related civil litigation expenses paid to competing applicant).

[44] Prior to modifications in our *Form 301 Report and Order*, adopted concurrent with this rule making, competing applicants were permitted to file applications without identifying in the application (1) a financial plan or sources of funding, (2) equity owners in the applicant who are sometimes the real parties behind the application, or (3) their plans for ownership integration. *See* n. 4 *supra*.

[45] *See, e.g.*, Comments of NAB at 16, Comments of CBS at 5-6, Comments of CBC *et. al.* at 9, Comments of UCC *et. al.* at 44, Reply Comments of Belo at 2.

[46] According to Post-Newsweek, the cost to its Miami and Jacksonville stations and their personnel of fighting renewal challenges while trying to operate effectively to serve the public was enormous. They noted that the staff was required to review 14,000 pages of records to compile information for one interrogatory alone out of 299. *See* Post-Newsweek Comments at 15-16 n.3. Metroplex reported that defending the WHYI renewal challenge has required hundreds of hours of station and management time to review thousands of documents, respond to interrogatories and depositions, prepare written hearing testimony, oversee work of counsel and appear at the hearings. *See* Comments of Metroplex at 3.

[47] *See, e.g.*, Comments of Post-Newsweek at 16, Metroplex at 3, NAB at 11, CBC *et al.* at 5-6, and UCC *et al.* at 44.

[48] *See, e.g.*, Comments of CBS at 5.

[49] Comments of S.E. Broadcasting at 9.

[50] *See* Comments of Metroplex at 3.

[51] *See* Comments of Great American at 4-7.

[52] We note that NAB attempted to compile statistical evidence of abuse but says it was unsuccessful because of, *inter alia*, the following factors: 1) its inability to collect statistically significant data because of a limited population of licensees that have faced license renewal since 1981; (2) confidentiality clauses prohibiting licensees from disclosing terms of settlement agreements; and (3) licensees' fear of retaliation for raising allegations of misconduct or extortion. Comments of NAB at 9-10.

[53] *See* Comments of NAB at 14-15 and App. A to NAB Comments, Att 2.

[54] *See, e.g.*, "FCC's License Sweepstakes: How to Succeed in Radio Without Really Buying," *Legal Times*, Vol. XI, No. 14, August 29, 1988; "A License to Extract Ransom?" *Barwood Review*, April 5, 1989 at 4; "A Call to Arms Over Comparative Renewal," *Broadcasting*, May 16, 1988 at 29; "Comparative Renewal: The Biggest Gamble on the Air?" *Broadcasting*, Aug 24, 1987 at 27-33.

[55] The Initial Decision is the determination by an Administrative Law Judge, after a full hearing on the merits, as to the applicant that should be awarded the broadcast license.

[56] Typically parties to a hearing are required to file motions to enlarge, change or delete issues, attend pre-hearing conferences, engage in discovery (generally by deposition) and file discovery-related motions, submit documentary and oral evidence at a hearing, and file proposed findings of fact and conclusions of law.

[57] If the Initial Decision favors the challenger, there is less concern about potential abuse of process. An incumbent licensee who seeks to renew its license is not in this category of potential abusers. Thus, as discussed in paragraph 33 *infra*, a challenger is free to pay an incumbent either to sell the station or to dismiss its renewal application at any time without monetary limitation.

[58] We note that the Supreme Court has stated that where the statutory provisions are clear and unequivocal on their face, there is no need to look beyond the words of the statute. *TVA v. Hill*, 437 U.S. 153, 148 & n. 29 (1978); *United States v. Oregon*, 366 U.S. 634, 648 (1961).

[59] H.R. Rep. No. 97-208, 97th Cong., 1st Sess 898 (1981).

[60] Sections 4(i) and 303(r) of the Communications Act accord the Commission considerable flexibility to adopt rules and regulations as may be necessary to carry out the provisions of the Act.

[61] *Cf. FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

[62] Our intepretation of the statutory language is not inconsistent with Congressman Wirth's floor statement that "the intent of the conferees was not, in any way, to prevent an incumbent licensee from making a payment in excess of expenses to a party challenging that licensee as a means of settling that challenge" except in those cases where the applicant was not *bona fide*. *See* 127 Cong. Rec. 18956 (1981) (comments of Congressman Wirth). Congressman Wirth's statement should not be liberally construed as compelling the Commission to approve settlement payments that exceed expenses. Rather, his statement indicates Congress' intent to remove the constraint on our authority in this area that previously existed under Section 311 and thus afford the Commission flexibility to allow reimbursement in excess of legitimate and prudent expenses where such payments are consistent with the public interest. Thus, as with the statutory language itself, his statement is consistent with giving the Commission broad discretion bounded only by the public interest standard in Section 311(d)(3)(A) and the express limitation in Section 311(d)(3)(B) directed at frivolous applications.

[63] Prior to the 1982 amendment, Section 311 prohibited the Commission from approving settlement agreements among competing applicants for new licenses that provided for payments in excess of legitimate and prudent expenses.

[64] Pub. L. No. 86-752, §5(a), 74 Stat. 892 (1960), *codified* at 47 U.S.C. §311(c) (1960).

[65] H.R. Rep. No. 97-765, 97th Cong., 2nd Sess. 49 (1982) (hereinafter "Section 311(c) Conference Report").

[66] 88 FCC 2d 1492, 1497 (1982).

[67] *See* 47 U.S.C. §309 (d); 47 C.F.R. §73.3584. Persons may also file, among other things, petitions to deny applications for construction permits, transfers, and assignments of licenses. Our policies articulated herein apply only to petitions filed against license renewal applications. *See Second Further Notice*, 3 FCC Rcd at 5180 n. 15. Abuse relating to petitions filed in other contexts will be addressed in our general proceeding on abuse of process (MM Docket No. 87-314). *See* n. 7 *supra*.

[68] *Office of Communication of the United Church of Christ v. FCC*, 779 F.2d 702, 710 (D.C. Cir. 1985).

[69] *Id.* at 708. *See, e.g.*, Comments of UCC at 30 and Reply Comments of Capital Cities/ABC at 8.

[70] 57 FCC 2d 42 (1975) *("Citizens' Agreements")*. With regard to this enforcement issue, the *Second Further Notice* specifically excluded from consideration our "policies set forth in *Agreements* regarding EEO or other non-programming aspects of station operation." 3 FCC Rcd at 5185 n. 51.

[71] Our presumption against agreements to pay *petitioner* for services rendered relates only to those citizens' agreements negotiated in the license renewal context in exchange for dismissing petitions to deny. We will address potential abuse in citizens' agreements in other contexts in our general abuse proceeding, MM Docket No. 87-314. *See* n. 7 *supra*.

[72] With respect to issues of licensee control that have arisen in this context on occasion, we believe that the Commission's general policies proscribing improper delegations of control are sufficient to ensure against licensee abdication through agreement with outside interest groups. *See generally Trustees of the University of Pennsylvania (WXPN-FM),* 69 FCC 2d 1394 (1978); *WCHS-AM-TV Corp.,* 8 FCC 2d 608 (1967).

[73] *See, e.g., Booth American Company,* 58 FCC 2d 553, 554 (1976); *Agreements Between Broadcast Licensees and the Public,* 57 FCC 2d at 53.

[74] All applications and petitions to deny filed in license renewal proceedings will be deemed pending before the Commission from the time an application or petition is filed with the Commission until an order of the Commission granting or denying the application or petition is no longer subject to reconsideration by the Commission or review by any court.

[75] "Other consideration," as used herein, constitutes any *non-financial* concessions, including but not limited to programming, ascertainment or employment concessions.

[76] We do not consider the inability to profit from a settlement of a competing application or petition to deny an adverse effect of imposing our new policies and rules on these applicants. As we explained above, filing a competing application or petition to deny with the intention or expectation of profiting from that challenge is a non-legitimate use of the Commission's processes.

[77] *See, e.g., Lorenzo W. Milam,* 4 FCC 2d 610 (1966), *aff'd sub nom. Christian Fundamental Church v. FCC,* 12 RR 2d 2116 (D.C. Cir. 1968). *See* FCC Form 301, Sec. VII.

[78] 71 FCC 2d 460, 467 (1979).

[79] *See* Comments of CBC *et al.,* Cox, Great American, Liebowitz & Spencer, Midwest, NAB, Post-Newsweek, and TOC.

[80] If an existing transmitter site is the only feasible site, the site is owned or controlled by the incumbent, and the incumbent claims it is unavailable, the Commission will not permit the incumbent's claim alone to preclude consideration of the challenging applicant based on the site issue. Should a competing applicant prevail under these circumstances and the unique site remain unavailable, the Commission will consider waivers, as necessary, to accommodate the prevailing applicant.

[81] *See Form 301 Report and Order,* n. 4 *supra.*

[82] *See Third Further Notice of Proposed Rule Making,* n. 5 *supra.*

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

Concurring in part, dissenting in part

In Re: In the Matter of Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, and Other Participants in the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process (BC Docket No. 81-742).

I share my colleagues' goal of improving the comparative renewal process. I write separately, however, because I disagree with the dosage they prescribe to cure its ills.

First, I agree that we should attempt to prevent abuse of process by prohibiting payments to challengers in excess of their legitimate and prudent expenses. This change will discourage challengers from filing applications to obtain a windfall settlement. Banning excess payoffs will provide a deterrent to this abuse.

I cannot agree, however, with the majority's decision to ban reimbursement altogether before an Initial Decision. The majority's line drawing will build perverse incentives into the renewal process. Banning reimbursement in the early stages of the proceeding will provide little or no additional deterrence, because challengers can still be reimbursed after the Initial Decision.

Nor will it significantly reduce challengers' leverage over incumbents because, even after an Initial Decision, the incumbent potentially faces a long, tortuous road ahead--the Review Board, the Commission, and the Court of Appeals. Instead, this two-tier approach will discourage parties from reaching a voluntary, good faith agreement at an early stage, at minimal cost to themselves and the Commission, in exchange for reimbursement of expenses. We will thereby prevent applicants from settling their differences and ending a hearing that neither of them wants to pursue. Rather than encouraging these legitimate settlements, we may be causing parties who want to settle to endure a long, pointless hearing through to an Initial Decision.

Secondly, I also share my colleagues' concern that we weed out potential abuse in the petition to deny process. Nevertheless, we should not lose sight of the value of petitions to deny in exposing violations of our policies and in prodding licensees to improve their performance. Therefore, I cannot support policies so harsh as to discourage the filing of legitimate petitions.

I favor limiting payments to petitioners in most cases to their legitimate and prudent expenses. If, however, a petitioner agrees to provide services for the licensee as part of an agreement to withdraw the petition, I would not *presume* that the agreement--which of course the parties enter voluntarily--is invalid. Rather, the Commission should examine the agreements case by case, with no presumption either way, and approve those agreements that involve the performance of legitimate services, at a reasonable rate.[1]

Finally, in repealing the Cameron Doctrine, I am pleased the *Order* recognized that the incumbent may own or control a transmitter site which is the only reasonably feasible site in the licensee's service area. *Order* at n. 80. There may also be cases where the incumbent leases the unique site but extracts an exclusive agreement from the site owner to prevent access by a challenger. This would raise an abuse of process issue. *(See Broadcasting,* April 24, 1989, "Open Mike" letter of Vincent L. Hoffman). We cannot allow the incumbent, through these and other such means, to supplant the FCC as the licensor.

FOOTNOTE FOR STATEMENT

[1] For example, a licensee may have had difficulty in recruiting qualified minority applicants. If the licensee and the petitioner agree to have the petitioner assist in recruitment, if the petitioner is qualified to perform that role, and if the payment for petitioner's services is reasonable, then we could approve the settlement agreement.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166
Phase II, Part 1

In the Matter of

Investigation of Special Access
Tariffs of Local Exchange Carriers

MEMORANDUM OPINION AND ORDER

Adopted: October 13, 1988; Released: December 1, 1988

By the Commission: Commissioner Dennis issuing a separate statement.

I. INTRODUCTION

1. In this Order, we complete the main phase of our investigation of the strategic pricing of selected special access services by local exchange carriers (LECs).[1] We began our investigation of this issue after several of the LECs set their rates for 1.544 Mbps High Capacity Service (HiCap) and Digital Data Services (DDS) at levels designed not only to reflect relative costs but also to achieve certain strategic objectives. These objectives included discouraging uneconomic bypass of switched access services and increasing the cross-over point at which it becomes economical for a customer to switch from multiple voice grade channels to HiCap service.[2]

2. We have considered the lawfulness of pricing HiCap and DDS services to reflect strategic considerations in addition to relative cost. We conclude that the LECs should have the flexibility to price these services based on objectives other than cost recovery such as deterring uneconomic bypass and managing the migration of demand for substitutable special access services. We also conclude, however, that such flexibility is not unlimited, and that strategic pricing for demand migration management or other similar public policy purposes may not unreasonably hinder the ability of access service customers to choose the most efficient and economic services for their specific telecommunications needs. Accordingly, in this order, we explain the standards by which we have evaluated the rates under investigation and to which carriers may refer in developing rates for the future. Finally, to give carriers and interested parties an opportunity to address whether the rates under investigation herein satisfy the guidelines, we direct the LECs with rates subject to this investigation to submit further explanations and justifications of their rates and we invite comments on those submissions.

II. BACKGROUND

3. HiCap and DDS services are, under the Part 69 Access Rules, subelements of the special access category. Part 69 specifies how interstate investment and expense costs are to be divided between switched and special access. The overall special access revenue requirement is then computed by the familiar method of multiplying investment less depreciation by the allowed rate of return, and adding the expenses. This sum, the special access category revenue requirement, is recovered via numerous individual rates, or "subelements," for the wide range of special access services. These services include dedicated channels ranging from telegraph grade to television, and may be single or duplex, analog or digital, and in some cases full - or part-time. In addition, the special access category includes the rates for numerous optional features and functions to meet the widely varying and often specialized needs of special access users.

4. This Commission drafted the Access Rules to reflect the basic differences between the individual service elements used for switched access and the multifarious separate services and features which comprise the special access category. The Access Rules establish the switched access rate elements and require the rates for each to be targeted to earn no more than the authorized annual rate of return. *See, e.g.*, Section 69.106. The rules require special access subelement rates to be targeted to recover the annual revenue requirement for the special access category as a whole at the authorized rate of return. The rules do not require carriers to target individual special access sublements to earn any specific rate of return. Under 69.113(d) of the Rules, "[c]harges for individual [special access] subelements shall be designed to reflect cost differences among subelements in a manner that complies with applicable Commission rules or decisions."

5. Because each HiCap facility can readily be converted into up to 24 voice grade lines, and these lines can be used to connect a large customer directly to an interexchange carrier to originate and terminate ordinary long distance calls, HiCap is, in effect, a volume discount and an attractive option for bypassing the local switched network. It is the entrance facility used, for example, to access AT&T's Megacom, Megacom 800, and Software Defined Network (SDN) Services, which were introduced in 1985. AT&T apparently does not provide HiCap service using its own facilities although other vendors do compete with local carriers using a variety of technologies. While the LECs generally provide HiCap by adding equipment to wire pairs, these channels can also be provided using microwave radio, optical fibers, or coaxial cables, including those used for cable television distribution, for example.

6. For purposes of this investigation, we have used the term "strategic pricing" to describe the pricing of HiCap and DDS not only to contribute to the recovery of special access category costs but to achieve in addition a marketplace objective such as influencing the mix of special access services and facilities used by LEC customers or the timing of changes in that mix.

7. The Common Carrier Bureau began this investigation of the strategic pricing of special access services in 1985. [3] The Bureau subsequently found that, in the annual access tariff revisions filed July 2, 1985, several carriers stated that they were pricing certain special access services at levels designed not only to recover costs but also to achieve certain strategic goals in the marketplace.

The Bureau concluded that rejection or suspension of those proposed tariffs was not warranted but that an investigation of the extent and actual efficacy of the carriers' strategic pricing was necessary. Accordingly, the Bureau incorporated these issues into the ongoing investigation of special access services in Docket 85-166.[4] This Commission subsequently affirmed the Bureau's actions.[5]

8. In the *May 24 Designation Order*,[6] the Bureau designated the issues to be investigated in this docket and divided the investigation into two parts. Phase I examines a range of issues involving rate structures and methodologies. Pleadings in Phase II of the investigation, concerning the reasonableness of rate levels, were deferred to allow time for a significant accumulation of actual operating experience. The scope of the investigation was also expanded to include the annual access tariffs which were filed July 2, 1985.[7]

9. On January 17, 1986, the Bureau directed the LECs to submit direct cases with respect to the justness and reasonableness of all special access rates.[8] The LECs were also required to submit information concerning their costs, revenues, and returns for the April-September 1985 period; actual revenue and return data for October and November 1985; and updated justifications for their post-October 1, 1985, rates. In their direct cases, a number of the LECs sought to justify their strategic pricing of HiCap as embodied in their July 2, 1985, annual access tariff filings.[9] This issue was in turn addressed in the responsive pleadings of a number of parties.

10. In the annual 1987 access tariff proceeding, several of the LECs again proposed rates for HiCap and DDS based on strategic considerations.[10] In many cases, the LECs reported targeting these rates to earn "returns" far in excess of the overall category target rate of return of 12 percent.[11] These "returns" were calculated using the LECs' FDC cost allocation methodologies because the Commission has not prescribed any cost allocations for special access services below the category level. The LECs nevertheless developed allocation methodologies to derive such rates of return and reported the results to the Commission. For example, New York Telephone's HiCap rate was projected to earn a 60 percent rate of return. The BellSouth Companies projected HiCap returns of 18 to 40 percent and the Ameritech Companies 16 to 47 percent. Bell Atlantic projected rates of return for DDS of 16 to 27 percent.

11. In denying petitions to reject these tariff revisions, the Bureau cited the finding in the *Access Tariff Review Order* that strategically-set rates for HiCap and DDS are not *per se* unlawful and concluded that rejection was not warranted in most cases.[12] It suspended some of the new rates for five months, however, and ultimately found unlawful certain rates for which the LECs projected earnings far above the category target.[13] The 1987 strategic rates that were not suspended were placed under investigation in this docket.

12. More recently, in the annual 1988 access tariff filings, many of the LECs continued their strategic pricing of HiCap and DDS services.[14] Pleadings relating to both the annual 1987 and annual 1988 access tariff filings discuss strategic pricing of special access services.[15] All of the revised strategically-priced rates are subject to this investigation.[16]

III. SUMMARY OF ARGUMENTS

A. *LEC Arguments*

13. The LECs' basic argument is that strategic pricing of HiCap encourages more efficient use of the network in several ways. First, because this Commission's Part 69 Rules assign a substantial part of local non-traffic sensitive (NTS) plant to be recovered from the per-minute Carrier Common Line (CCL) rates for switched access, large users may experience a significant price advantage by using special access,[17] even when the services are largely substitutable and the price advantage does not reflect any cost advantage. The higher switched access charges thus encourage uneconomic bypass of switched services, i.e., customers' choice of special access rather than switched due solely to price differences that do not reflect the "real" underlying cost differences.

14. This form of bypass is often called "service bypass" because the customer still uses LEC facilities, but not the switched services most ordinary customers rely on. The cost of providing those switched services is thus spread over a smaller base of customers and usage. "Facility bypass" occurs when a customer replaces LEC facilities entirely and obtains facilities provided by another vendor or the customer itself. The LECs argue that both kinds of bypass are marketplace facts to which they must respond; Pacific Bell states, for example, that 31 of the 500 largest U.S. corporations used some form of bypass in 1984, with an additional 13 percent expected to follow by 1987.[18]

15. The uneconomic incentive for service bypass is exacerbated for some LECs because of the current pooling of CCL contributions. Bell Atlantic states, for example, that it is unable to pass on its lower regional costs to its switched access customers, but that its special access rates do reflect those economies. The net result is said to be that service bypass becomes attractive at an even lower traffic level.[19] The LECs argue that they must be free to price those special access services that are attractive alternatives to switched services at a level that deters abrupt migration of high volume users from switched to special access. Keeping large volume users from leaving the public switched network would, it is urged, help reduce the need for local rate increases.[20]

16. Second, the LECs argue that strategic pricing of HiCap in relation to voice grade special access services produces more efficient use of the network and manages the migration of customers to HiCap in a way that reduces stranded investment. For many LECs, managing this sort of intra-category service migration appears to be the primary objective of their strategic pricing, which they accomplish by setting HiCap rates at particular cross-over points in relationship to the substitutable voice grade services.[21] BellSouth set a cross-over point at 16-18 voice grade circuits, Bell Atlantic at 10-16, and Ameritech at 15 in Illinois and at apparently lower levels in other states.[22] NYNEX states that if the New York HiCap and voice grade service rates were set at cost, any New York Telephone customer with six or more voice grade circuits between the same two points would find it economical to switch to HiCap.[23] It claims that this would result in substantial unused plant, thereby reducing network efficiency and resulting in higher rates for the general body of ratepayers.

17. This inefficiency would occur because migration to HiCap assertedly would produce abandoned voice grade facilities and associated circuit equipment which could

not be put to alternative uses.[24] Voice grade circuits installed to serve locations of particular large customers could not, for example, be readily reused, at least in the short term. Furthermore, the HiCap facilities themselves might in many cases be used at relatively low fill rates, if rates were not set at a relatively high cross-over point. A high cross-over point thus encourages the use of HiCap only by customers who are likely to make efficient use of it. BellSouth states, for example, that its ratemaking approach "was intended to establish a continuum of prices for High Capacity and other substitutable Special Access services, and thereby maximize the efficient use of network facilities across all services comprising the Special Access category."[25]

18. Third, strategic pricing is also said to reduce churn and replacement of facilities, and thus reduce shortfalls in the recovery of non-recurring costs.[26] Non-recurring charges (NRCs) have generally been set below the actual non-recurring costs of providing and terminating service, although this Commission recently concluded that full-cost NRCs are reasonable.[27] Even in that case, this Commission encouraged transitional measures which would retain relatively low NRCs, and thus encourage replacement of facilities. Strategic pricing of a rapidly growing, substitute service such as HiCap would tend, it is claimed, to offset uneconomic price signals of low NRCs.

19. Fourth, Bell Atlantic contends that maintenance and testing expense on a DS 1 circuit (a typical HiCap facility) is, on average, greater than that required for a standard voice facility.[28]

20. The LECs claim that, as a result of these factors, they have priced their HiCap service within a range which will simultaneously discourage network inefficiency by customers who might shift from use of switched services or voice grade lines if HiCap were priced at cost, while not encouraging complete facility bypass by customers who would obtain the facilities from competing vendors. Bell Atlantic describes the situation in this way:

> In establishing its rates for DS 1 facilities for the July 1985 tariff filing, Bell Atlantic operated within two externally driven constraints. First, the attractiveness of DS 1 as a vehicle for service bypass made it desirable to price DS 1 high enough so as not to artifically stimulate uneconomic service bypass. On the other hand, the ready availability of non-exchange carrier alternatives for DS 1 level capacity placed an upper constraint on prices, since a DS 1 rate in excess of the cost of alternative bypass vehicles would merely divert potential Bell Atlantic customers to alternative suppliers.

Bell Atlantic Reply of March 14, 1986 at 11 (footnote ommitted).

21. Based on this approach, Bell Atlantic calculated that the monthly cost of a 10-mile microwave DS 1 obtained from another vendor would be in the range of $1,300 to $1,500, and filed rate increases to reach a level of about $1,000 in most of its jurisdictions. It did not base HiCap rates on this strategic approach in Pennsylvania or Delaware.

22. As a legal and policy matter, the LECs consistently assert that nothing in the Communications Act, Commission policy, or Part 69 of the Rules requires special access subelement rates to reflect only costs, except to the extent that the overall category *in toto* may earn no more than the authorized rate of return. The LECs argue that while costs are an appropriate starting point for special access subelement ratemaking, non-cost considerations must also be factored into the rate development process for individual special access rates.

23. Pacific Bell argues, for example, that "[c]ost differences among subelements should be used to establish rates except in those limited instances where external and/or internal pressure may necessitate a departure from 'pure' cost based pricing."[29] Pricing HiCap and voice grade services to maintain a reasonable price and value relationship is said to be justified under this standard. Prescription of detailed cost allocation and ratemaking standards would, it is urged, inhibit the LECs in their efforts to deter uneconomic bypass and result in underutilization of existing plant and higher rates for small customers. The LECs also argue that the alternative offerings of other vendors represent effective competition to their strategically-priced special access offerings and provide effective price discipline.[30]

B. ***Opposition Arguments***

24. Most of the interexchange carriers and user groups strongly oppose the LECs' strategic pricing practices on both legal and policy grounds.[31] Strategic pricing of HiCap is said to have resulted in wide ranges in charges even in contiguous states, and the substantial mark up of rates above costs. For example, in the annual access rates that became effective October 1, 1985, BOC HiCap channel termination rates ranged from a low of $65.12 to a high of $478.35 and rates for eight-mile Hicap access channels ranged from $502.90 to $1426.77. Southwestern Bell in Texas, for example, projected HiCap channel termination costs of $239.16 and a rate 39 percent higher, $362.00. Channel mileage cost for eight miles was $545.54 and the rate was 29 percent higher, $702.77.[32] The rate increases to implement the LEC strategic rates averaged 20 percent in the October 1, 1985, rates, and ranged as high as 159 percent.[33]

25. Those opposing the strategic rates state that Section 201 of the Communications Act requires that all rates be just and reasonable and that each carrier is obligated to assure that its rates for individual services are not outside the zone of reasonableness. They assert that the authorized rate of return must accordingly apply to each special access service and not just the special access category as a whole. Ad Hoc contends that the returns produced by certain proposed HiCap and DDS rates -- particularly in the 1987 access tariff revisions -- are far in excess of the allowable zone of reasonableness and are therefore unlawful. Ad Hoc also asserts that the LECs' strategic pricing practices constitute uneconomic preferences that prejudice and disadvantage ratepayers in violation of Section 202(a) of the Act.[34]

26. AT&T contends that the LECs have failed to meet their burden of showing that the rate increases for strategically-priced services are lawful, and that non-cost-based rates for digital access services contravene this Commission's access charge Orders, as affirmed by the courts, and the Modification of Final Judgment.[35] AT&T argues that the rates violate one of this Commission's basic goals in adopting the access charge rules, the establishment of cost-based rates. AT&T notes, for example, this Commission's view that "actual costs of providing service underlie

the statutory requirement that rates be just, reasonable and non-discriminatory"[36] and that this Commission rejected as unlawful special access rates "unsupported by cost."[37]

27. AT&T and others opposing strategic pricing also argue that the HiCap rates will encourage, not deter bypass. AT&T claims that the vast majority of HiCap facilities are not being used for service bypass but for the economical provisioning of special access. As of January 1986, 80 percent of AT&T's high capacity digital facilities were used to provide private line services or for voice grade switched services which the LECs themselves elected to provision using high capacity digital. AT&T and other users also contend that attempting to deter service bypass by increasing HiCap rates will only encourage total bypass of the local network by customers who conclude that construction of private bypass facilities would be warranted.[38]

28. Opponents of strategic pricing also argue that it deters users improperly from selecting advanced, efficient services in order to maintain demand for less efficient services, thus reducing network efficiency and users' freedom to make economic decisions in the marketplace. Users also contend that neither intra-service nor inter-service bypass has been demonstrated to be of sufficient dimension or so deterimental as to justify strategic pricing to the extent proposed in the tariff filings.[39] MCI suggests that uneconomic service bypass does not even exist in many areas and that, in any case, the recent reductions in switched access rates have reduced incentives for this form of bypass.[40]

29. To the extent that strategic pricing is based upon maintaining a relationship between voice-grade and HiCap services, users also argue that the rates are inconsistent with this Commission's rejection of an "alignment" theory of ratemaking.[41]

30. IDCMA argues that the rates for high capacity services offered by dominant carriers should be based on the costs of providing these services on a rate-element-by-rate-element basis and that pricing factors other than cost should not be tolerated absent a more compelling showing than the carriers historically have made.[42] It also dismisses the argument that rates for high capacity services cannot be set much below the costs for competing services because to do so would encourage excessive demand. IDCMA asserts that so long as rates are set to earn a carrier's authorized rate of return, it is difficult to imagine that any level of demand could be seen as excessive. It also argues that local loops are fungible and that use of loops to meet growth in private line demand and as facilities for other services would absorb any excess capacity.[43]

31. Some of the commenters also contest the LECs' assertion that marketplace forces are a meaningful check on strategically set rate levels, citing the rates of return at which some carriers targeted their HiCap and DDS rates in the 1987 annual filings, which ranged up to 116.7 percent for individual subelements and were generally between 18 and 33 percent where returns could be calculated.[44] They argue that allowing strategic rates would constitute unlawful rate deregulation of these services by this Commission.[45]

IV. DISCUSSION

32. The Communications Act requires that rates be just and reasonable and not create unreasonable discrimination or undue preference. Sections 201(b) and 202(a), 47 U.S.C. §§ 201(b), 202(a). Costs are traditionally and naturally a benchmark for evaluating the reasonableness of rates, because cost-based rates both deliver price signals which contribute to efficient use of the networks and generally distribute network costs to the customer who causes those costs. Our requirements for cost support and rejection of rates which would exceed costs, without valid cause, reflect the importance of costs to any evaluation of rates, including special access subelements.

33. As the LECs point out, however, the Act does not preclude factors other than cost from being considered in the ratemaking process. Indeed, achieving a proper balance among the separate goals that are a part of the statutory mandate requires consideration of relevant factors in addition to costs in assessing the overall reasonableness of rates.

34. Special access services have particular characteristics which must also be taken into account. First, our rules set a limit on the overall return for the special access category. Thus, any flexibility the LECs may have in pricing special access subelements can only be exercised within the constraints of the category return prescription. As a result, LECs have a limited ability and relatively low incentives to price individual special access subelements at inordinately high levels – high prices for one subelement could require either low prices for others or could justify refunds on a category basis.

35. Second, the precise allocation of special access costs to individual subelements necessary even to calculate returns by subelement is difficult, and for many costs a variety of reasonable allocations could be justified, because of the multitude of such subelements and the extent to which special access plant is used jointly and commonly to provide these services. Developing detailed cost allocation rules for these services would most likely be a futile attempt to achieve an illusory precision, given the wide range of allocations that would be reasonable for these services.[46] Yet without cost allocations, rates of return on a subelement basis cannot be calculated. Moreover, inflexible and inherently arbitrary cost allocation rules could well hamper realistic pricing, while doing little to assure reasonable rates beyond what is already achieved by the category earnings cap.[47]

36. In general, then, special access subelements should, as Section 69.113(d) states, reflect ascertainable cost differences but are not required to be individually targeted at the category rate of return (assuming such targetting is even possible) and indeed may appropriately be based in part on factors in addition to relative cost, given the problematic nature of cost allocation for these services. The issue turns on whether the factors upon which rates are based include only ratemaking objectives that serve the public interest and whether the resulting rate levels are likely to achieve those objectives.

37. As the summary of their comments indicates, the LECs argue that setting rates within a range which discourages both uneconomic service bypass and abrupt customer migration from substitutable voice grade special access, without encouraging facility bypass, will foster network efficiency and thus benefit customers generally. As

we discuss below, we conclude that several of the considerations urged by the LECs to justify strategic pricing do have merit.

A. *Deterring uneconomic service bypass*

38. Switched access rates have, since the introduction of access charges, included high Carrier Common Line (CCL) rates to recover a portion of local exchange costs. These charges did encourage uneconomic bypass, even though they have been phased down substantially (the initial premium CCL charges for both ends of a call in 1984 were 10.48 cents per minute; the current charge is 4.14 cents), and will be reduced further by scheduled reductions on December 1, 1988, and April 1, 1989. During the period in which the strategically priced rates have been in effect, these non-economic charges did encourage large users to consider service or facility bypass to reduce their telecommunications costs. Bypass facilities are not subject to these charges, so a heavy user could save hundred of dollars a month by taking a single voice-grade circuit even if use of the switched network would have been more efficient in economic terms.

39. This Commission has itself adopted policies to dampen the uneconomic bypass that CCL charges encourage, in large part because of our concern that, once bypass facilities are built, their traffic will not return to the network. Thus, short term effects of the CCL rates might be permanent uneconomic use of facilities. The direct assignment of WATS lines as special access and the application of CCL charges predominantly upon terminating minutes of use were both intended to deter uneconomic bypass for particular services.

40. The LECs' strategic pricing of their various HiCap rates can be justified from this perspective. HiCap is a primary bypass facility, as its use in AT&T's major new service bypass offerings Megacom and SDN indicates. Setting HiCap's price at a level which reduces the artificial price advantage of bypass should encourage more efficient use of the network in the long run, albeit at the cost of discouraging some usage of HiCap for other, non-bypass purposes. This seems a reasonable tradeoff, especially in view of the fact that such pricing is constrained significantly by the rate of return prescription for the special access category as a whole.

41. The arguments advanced by AT&T and other commenters that strategic pricing will encourage rather than deter bypass are not persuasive, however, since they assume that the LECs cannot demonstrate that their HiCap rates were still priced at a level below rates likely to be charged by alternative vendors. In fact, the LECs have reduced the HiCap rates where it appeared they would stimulate facility bypass.[48] Indeed, AT&T itself is by far the largest customer for these facilities and it does not suggest that the strategic rates led it to provide these facilities itself or to procure them from other sources.

42. The actions we have taken to reduce the uneconomic recovery of non-traffic sensitive (NTS) costs in CCL rates have, of course, made the service bypass problem increasingly less acute. The further steps scheduled to reduce CCL charges should further reduce or eliminate a justification for strategic pricing based upon deterring uneconomic service bypass. The use of some strategic pricing of potential bypass facilities for the period to date, however, may have justification in terms of the long term efficient use of the switched network.

B. *Cross - over point pricing to manage demand migration*

43. With the reduction in CCL rates, the remaining purpose of strategically priced HiCap rates is to establish a desired rate relationship with voice grade special access services. This is reflected in the use by many carriers of rates set at particular cross-over points, *i.e.*, the rate levels at which users will cross over from taking multiple voice grade channels to taking a single HiCap line. It reflects in turn the fact that HiCap is effectively, from the customer's perspective, an offering of a package of voice grade circuits. The 1.544 mbps channel can, of course, be used for other purposes, notably high speed data transmission, but its apparent major use is as an economical alternative to special access voice grade lines for ordinary voice message traffic.[49]

44. Trends in usage data verify that customers treat these services as interchangeable according to the customer's traffic volume needs. Over the last few years, as interexchange carrier (IC) services using HiCap entrance facilities have devloped a market, use of LEC HiCap services has expanded dramatically, by 97 percent for the Bell Operating Companies (BOCs) as a whole in the period from mid-1986 to mid-1987 alone. By contrast, voice grade facilities showed actual declines of 3.6 percent during the same period, despite strong growth in special access voice grade lines used for services such as WATS and 800 Service. *See* Attachment D to this order which the displays changes since the 1985 in numbers if circuits provided by the Bell operating companies (BOCs) and selected independent telephone companies. Up to mid-1987, in fact, HiCap growth and voice grade decline had been so dramatic that HiCap capacity on an equivalent-line basis had essentially matched total voice grade capacity. For mid-1987, the BOCs reported 1.139 million voice grade lines and 46,902 HiCap circuits each capable of providing 24 voice circuits, a total of 1.126 million voice equivalent circuits. This migration has continued and HiCap is surely now the dominant form of dedicated access facility. Customers are, in large numbers, replacing individual voice circuits by HiCap circuits configured with multiplexing equipment to derive voice-equivalent circuits.

45. The pace of this customer migration and of the churn in replacement of facilities, even in the face of the strategically-set HiCap rates, supports LEC claims that setting a relatively high cross-over point for HiCap and voice grade rates permits LECs to better manage a smooth migration to HiCap and that this in turn reduces network inefficiencies and stranded facilities. The absolute decline in voice grade traffic clearly demonstrates that in-place facilities are no longer being used.

46. Some of the comments argue that voice grade facilities are "fungible" and that "growth in private line (and especially voice grade) demand, as well as use of the facilities for other services, would absorb any excess capacity in the 'stranded' voice grade facilities."[50] In fact, the pace of this migration indicates that, at least within the special access category, this does not necessarily occur and, to the extent it does, may occur only gradually. Excess capacity cannot easily be absorbed, obviously, if the number of circuits is actually declining, as it is overall and at a rapid pace in many areas. Some of these facilities may be usable for other purposes, including ordinary local exchange service, but even in these cases some facilities will most likely be stranded in the short term and others will require relocation or other reconfiguration. It

is likely that in many cases where a block of voice grade channels configured to serve a specific large business customer is cancelled, those facilities will often not be immediately or readily available to serve new, individual residential customers.

47. Moreover, as the LECs point out, non-recurring charges have not generally recovered the costs of installing and removing facilities, so that unusual churn such as that demonstrated by the migration from voice grade to HiCap imposes costs on the LECs which must be passed on to all users in recurring charges. These lower non-recurring charges also artificially encourage such churn by understating the true economic costs. For these reasons, this Commission concluded that it would permit NRCs to recover full non-recurring costs, but throughout the period that strategic rates have been in effect, this additional uneconomic inducement for churn has operated.

48. As the commenters point out, strategic pricing of HiCap does have the inefficient result of encouraging customers to continue to use older, less cost-effective services and facilities when newer, more advanced facilities are available. Strategic prices should be transitional, however, as the rate of migration levels off and the services mature. As is evident from the data reviewed in the paragraphs above, the rates may have slowed, but clearly have not prevented or reversed, movement toward lower prices and efficient usage. At any given price level, after all, some customers will continue to prefer individual voice grade circuits. Maintaining strategic rates over time will also encourage competitive inroads, especially because the largest users will find even higher capacity facilities such as DS-3 to be attractive alternatives.

49. To summarize, we conclude that the LECs have stated valid reasons in principle to set HiCap rates strategically during the period to date, both to coordinate HiCap and switched access rates in order to deter uneconomic service bypass and to manage the migration of usage from voice grade to HiCap in order to moderate inefficiencies and churn. That conclusion, however, does not answer the further, necessary question of whether the specific rate levels tariffed by the LECs were likely to achieve these objectives.

C. *Strategic pricing standards*

50. Commenters have suggested that if strategic pricing is accepted, it should be limited by directing that the strategically priced service earn no more than a strategic premium defined in terms of the rate of return for the particular service. Ad Hoc suggested that strategically priced rates earn no more than an 18 percent rate of return, for example.[51]

51. We judge this to be neither a workable nor an appropriate test for strategic pricing. It is not workable because, as we discussed above, the specification of a uniform subelement cost allocation methodology necessary to any calculation of rates of return for special access subelements is in substantial part an arbitrary process which cannot provide the basis for meaningful strategic pricing standards. The limitations on identifying such a methodology result in at least two problems: (1) a LEC could quite reasonably allocate costs in ways that would justify a wide range of rates of return for the subelement; and (2) comparisons of rates of return among different LECs, with widely varying facilities and rate structures which would justify widely varying allocation schemes, can not be reliable or meaningful. Thus, the use of fixed rates of return for all LECs' subelements would also not be reliable or meaningful.

52. Moreover, the use of an arbitrarily calculated rate of return for special access subelements is inconsistent with the potential public interest objectives of strategic pricing. When strategic pricing is justified at all, it is because there is a valid public interest purpose which the strategically priced rates can reasonably be expected to achieve which will be frustrated by a fixed rate of return calculation. There is no apparent connection between the valid purpose of deterring uneconomic bypass by adjusting the relationship between the rates of two services and the rate of return which one of the services will earn. As the LECs describe, achieving that purpose requires consideration of the effects on customer choice of two or more *rates*, and limiting one of those rates additionally to a specific rate of return seems quite likely to defeat that purpose, or at least to reduce the extent to which the purpose is achieved. Setting the HiCap-voice grade rate relationship in a way that moderates inefficiencies occasioned by sudden customer migration similarly is not usefully evaluated or judged by a fixed rate of return standard.

53. We do not mean to suggest that considerations of cost are not relevant, and indeed fundamental, to an evaluation of strategic rates. While it is true that the use of a subelement rate of return prescription as a fixed tripwire limit on strategic pricing is not a rational approach, it is also true that, the greater the deviation from uniform subelement return levels based on some reasonable cost allocation, the more likely it is that pursuit of the strategic purpose will unduly impinge upon other important goals, and thus be unreasonable. We have concluded, therefore, that our evaluation of the reasonableness of strategic rates must also take into account the relationships among the various rates and services. The direction of Section 69.113(b) that special access rates should reflect costs is thus best understood as requiring that the hierarchy of special access rates should be consistent with the corresponding hierarchy of reasonably allocable costs, to the extent such a hierarchy can be discerned. A price structure which does not merely adjust the intensity of the price signal, but actually transmits a false signal by pricing a less costly service at a higher rate than a more costly alternative would appear to violate this rule.[52]

54. In the case of HiCap, which as we have discussed is functionally and operationally the equivalent of a volume offering of voice grade circuits, existing pricing flexibility standards also apply. In the *Volume Discount Practices Order* [53] we established structural criteria for evaluating private line and special access offerings as well as additional criteria for evaluating the reasonableness of volume discount offerings:

> [A] volume-discounted offering should be integrated into a rate structure of similar service offerings with no restrictions on customers or uses. This integration, together with our policies promoting resale, sharing, and reasonable interconnections, will limit a carrier's ability to discriminate. It is easier and more beneficial to the public interest for the Commission to limit discrimination by inspecting a carrier's rate structure than by delving into a carrier's

> detailed cost justification applying an FDC [fully-distributed cost] standard, incremental cost approach, or some other pricing practice.

Id. at 944-45. We concluded by adopting the following approach:

> We will consider each volume discount for a private line or special access service individually until we develop sufficient experience to establish pricing guidelines. We do not hereby adopt a marginal cost, long-run incremental cost, average variable cost, or any other specific standard for the reasonableness of volume discounts. Our primary concern will be whether the discount fits into an integrated rate structure of similar service offerings. We will also look to whether the volume discount contributes to meeting competition . . . and to reasonable rates and efficient service for all users.

Id. at 949.

55. This same approach is, we judge, equally applicable and appropriate in evaluating strategic pricing of directly substitutable individual and volume special access services such as voice grade and HiCap. Where the services are part of an integrated rate structure, we will look to whether the proposed rate relationship establishing the level of the discount for the volume service will produce "reasonable rates and efficient service for all users."

56. In evaluating whether special access rate relationships do result in reasonable rates and efficient service, we further believe that an examination of the anticipated practical effect of the rates on customers is most consistent with this flexible, structural approach. For example, to the extent that strategic pricing is premised on reducing the negative effects and costs of a rapid customer migration between services, a price relationship which unreasonably hinders such migration or permanantly discourages efficient service and reasonable rates would exceed the limits of the valid strategic purpose. Such rates would not simply manage the migration but price a valuable service "out of the market" so that customer choice is arbitrarily restricted.

57. Procedurally, evaluation of carrier proposals for strategically priced rates necessarily requires that carriers adequately explain and justify the ends such pricing is intended to serve and establish that the means chosen will achieve the objective without unduly intruding on other objectives, such as customer choice and efficient service. Moreover, the justification for strategic pricing is likely to be limited in time, and in any event circumstances affecting the reasonableness of the fact or extent of strategic pricing will change over time. For this reason we will require that all LECs provide a *de novo* justification of their strategically-priced special access rates in each annual access tariff filing. The justification should consist of a demonstration that the rates proposed will meet the standards set forth herein.

58. To summarize, special access rates must be targeted to levels that produce a category rate of return within the prescribed level. Below the category level, however, rate of return calculations are not useful given the range of reasonable cost allocation methodologies justified by the nature of special access services and the facilities used to deliver them. Moreover, carriers may have a legitimate need for flexibility in setting rate relationships within the category based on factors besides relative cost allocations. To determine whether carriers have exercised that flexibility to produce subelement rates at just and reasonable levels, we will apply the following guidelines:

> 1. Carriers cannot deviate from the cost allocation and rate of return requirements for the special access category set forth in Part 69 and Part 65 of our rules. The category costs establish the benchmark for evaluating subelement rates.
>
> 2. The hierarchy of any special access rate structure incorporating strategically priced rates must be consistent with the hierarchy of underlying costs for special access services; the rates for less costly services cannot be higher than those for more costly services.
>
> 3. Strategic pricing of subelement rates must further a specific public interest such as reasonably managing demand migration between substitutable services and discouraging inefficient use of the network.
>
> 4. Strategically priced rates cannot unreasonably hinder a customer's choice of access service, the development or implementation of new technologies, and the efficient use of the network.
>
> 5. The strategically set rates must conform to the Commission's requirements for volume discounts set forth in the *Volume Discount Practices Order* (97 F.C.C. 2d 923 (1984)), *e.g.*, the rates must be integrated into the special access rate structure with no restrictions on customers or uses.
>
> 6. The validity and extent of strategic pricing is to be explained and justified *de novo* in each annual access tariff filing.

Carriers who propose strategic rates have the burden of demonstrating that their rates are consistent with these guidelines.

59. Some of the comments argue that allowing strategic pricing would constitute unlawful rate deregulation. As this discussion and these standards indicate, this is not the case. These standards, including the overall cap on category earnings, will act to limit special access rates to those which are just, reasonable, and not unreasonably discriminatory under the Act, based upon costs and the other valid factors which are properly considered in computing and reviewing special access rates.

D. ***Rates under investigation***

60. In defense of their strategically priced rates, the LECs have relied primarily upon claims that their pricing furthers public interest objectives, as noted in the discussion above. In light of our statement herein of the guidelines we will use to evaluate these rates, the LECs have not, of course, had an opportunity to address the question of how the rates under investigation satisfy the guidelines. We conclude that the LECs must be given that opportunity. Accordingly, we direct the carriers whose rates took effect subject to this phase of Docket No. 85-166 to file within thirty days of the release of this order supplemen-

tal direct cases addressing this issue.[54] Interested persons may file oppositions to the direct cases no later than 20 days after the time for filing direct cases has ended.

61. In their pleadings, the carriers should address each guideline and demonstrate how the rates under investigation satisfy the guidelines. To insure useful filings and a sufficient record, we discuss in the paragraphs below the showing and kinds of supporting information we expect carriers to provide in their supplemental cases and we give examples of the data we seek. We emphasize at the outset that we will not accept generalized contentions that factors other than cost are appropriate ratemaking considerations. Such contentions are not sufficient to support a particular rate level. The carriers must address how the particular rate levels under investigation satisfy the guidelines.

62. The first guideline requires compliance with the cost allocation and rate of return requirements in Part 69 and Part 65 of our Rules, 47 C.F.R. Parts 65, 69. We expect carriers to include in their direct cases all current information available regarding their actual earnings on the special access category during the period that the rates under investigation were in effect, including the most recent actual and projected results for the 1988 access year (1/1/88 - 4/1/89).

63. The second guideline requires a carrier's rate hierarchy to reflect its cost hierarchy. Carriers should provide in their supplemental direct cases sufficient information to enable us to determine whether, using the cost allocation methodology employed by the carrier to develop the rates under investigation, less costly services were priced at a higher rate than more costly alternatives.

64. Our third guideline requires the carrier to identify the specific public interest furthered by their strategically priced rates. Most LECs have done so already in the pleadings filed in this docket. We expect the supplemental direct cases to provide supporting data for the LECs' claims and to address how the particular rates under investigation achieve the objectives identified by the LECs. For example, those LECs who claim that their strategically priced rates are designed to manage demand migration to prevent excessive levels of stranded investment should provide the estimates of such stranded investment upon which they rely and the data supporting those estimates. The LECs should also address the relationship between the rate levels under investigation and the stranded investment they claim.

65. Our fourth guideline prohibits strategically priced rates that unreasonably hinder customer choices, technological innovation or efficient network use. As a measure of whether strategic pricing unduly impinges upon these goals, we will give substantial weight to evidence of actual and projected demand response to changes in rate structures. For example, the data displayed in Attachment D indicate that the demand for HiCap circuits has been very strong during the period under investigation, ranging from 50 percent to almost 175 percent, and averaging 97 percent, from mid-1986 to mid-1987 alone. The LECs and parties filing oppositions should address how these demand data support or undercut their positions regarding the effect upon customers' usage patterns of the rates under investigation.

66. We require strategically set rates to conform to the Commission's volume discount requirements in our fifth guideline. We addressed many of the issues raised by our *Volume Discount Practices Order* in earlier Commission proceedings. *See, e.g., Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, Phase I and Phase II, Part I, Mimeo No. 2647, released February 19, 1985. Parties addressing this guideline should consider the effect of those earlier proceedings.

67. Finally, our last guideline requires carriers to justify *de novo* in each annual access tariff filing the strategic pricing reflected in their rates. To the extent that a carrier continues to charge in the 1989 access year any of the rates under investigation, carriers must include a justification under our strategic pricing guidelines.

E. *Reasonableness of Future Rates*

68. Finally, we turn to the question of whether continuation of the strategic pricing of HiCap will be reasonable in the future. Under the standards adopted in this order, such strategic pricing will be more difficult to justify because the carriers have justified their strategic pricing to date on the basis of conditions which will change in the near future.

69. The pooled, artificially high CCL rates imposed upon alternative switched services will, by April 1, 1989, be reduced, approximately to the level of relative use, by the final step in this Commission's program to align recovery of common line costs with rates.[55] Individual LECs will be allowed to file depooled CCL rates. Thus, the rationale that strategic pricing of HiCap facilities will act to deter uneconomic bypass of switched services would appear to be effectively eliminated. At that stage, it would appear more likely that strategically priced HiCap rates would express their negative effects, by distorting customer choices and discouraging use of modern, more efficient facilities, without any long term benefits.

70. Carriers should also, by that time, have largely or entirely completed their transition to cost-based non-recurring charges (NRCs) which will permit further moderation of HiCap rates. Special access NRCs are imposed by the LECs to recover the one-time costs of installing, removing or reconfiguring special access facilities. In our *NRC Order* in this docket[56], we concluded that non-recurring costs, which historically have been recovered through a combination of non-recurring and recurring charges, henceforth should be fully recovered through NRCs alone. Because of that action, we expect special access rates to decrease, as recurring charges are reduced to reflect the reallocation of non-recurring costs to NRCs, and non-recurring costs to shrink, as unnecessary and uneconomic facility churn is discouraged by more accurate recovery of costs from the cost-causer.

71. In the *NRC Order*, we recognized that abrupt increases in the then current below-cost NRCs could create dislocations for the LECs and their access customers. We therefore encouraged transitional approaches to implementation of the new rates. We expect the LECs to continue their transition to cost-based NRCs and we are prepared to prescribe a time table for completing that transition should the LECs fail to make sufficient progress voluntarily. We expect that the LECs will be able to apply both the direct revenue benefits and the indirect benefit of reducing facilities churn to lower their charges for HiCap as well as other special access services.

72. The transitional costs and inefficiencies associated with rapid migration between voice grade and HiCap services should also be largely a thing of the past. As we have seen, HiCap capacity has already overtaken voice

grade. The near doubling of HiCap usage which occurred in 1986 to 1987, based largely upon migration, is thus highly unlikely to continue. The BOCs themselves projected strong but much more moderate growth of 18.5 percent in 1988. It appears likely that by 1989 HiCap and voice grade usage will have approached an equilibrium at current prices.

73. Accordingly, under the standards developed in this order, we do not believe it is likely that these rationales will continue to justify strategic pricing of HiCap facilities once the common line cost recovery program and depooling are completed on April 1, 1989.

74. However, we also believe it is important to allow the LECs a reasonable measure of flexibility in setting future special access rates, particularly HiCap rates. In view of the difficulties and inherent uncertainties of developing cost allocation methods, the large number and diversity of services and features, and the various practical problems of designing rate structures and relationships for services which both jointly use facilities and are often substitutable, we do not believe it is realistic to attempt to establish a specific level for reasonable HiCap rates. Moreover, rates which fall within a reasonable range around likely costs do not present significant concerns that would warrant the application of the strategic pricing standards. Accordingly, we will not require carriers to provide a showing under the guidelines set forth in paragraph *58*, above, if they file rates that are within this range of reasonableness.

75. We believe that it is important to clarify for carriers and customers alike where we believe that range lies, at least as a preliminary matter, in order to inform the LECs of when they will be expected to submit appropriate justification under our guidelines. The best evidence of record in this proceeding, as provided by Nynex for example, is that the cost crossover point between voice grade and HiCap services of average length is about 6 4-wire voice grade circuits to 1 HiCap. None of the commenters appear to challenge the Nynex estimate and we believe it is a reasonable benchmark for the cost relationship between voice grade and HiCap services.

76. This figure probably varies somewhat for other LECs and other distances and may change over time, especially as a result of technological advances. In order to allow the LECs flexibility within a reasonable range which recognizes the likelihood of variations in specific cases, while also protecting customers against rates outside such a range, we will adopt a presumption that a crossover point no more than 30 percent above and below a 6 to 1 ratio, *i.e.*, no more than 8, and no less than 4, 4-wire voice grade circuits to 1 HiCap circuit of average length, does not exceed the range of reasonableness or present significant concerns of strategic pricing. Conversely, we will presume that any HiCap rates above an 8 to 1 crossover point most likely represents strategic pricing of HiCap. This presumption is rebuttable in either case. However, we direct LECs proposing HiCap rates above an 8 to 1 crossover point to provide substantial justification (as part of the next general access tariff scheduled to be effective April 1, 1989 or other relevant subsequent filing) supporting the proposed rates under the standards established in this Order. Carriers should expect that a failure to provide adequate, persuasive support under the guidelines set forth herein will result in suspension and investigation of the rates, or other appropriate corrective measures.

V. CONCLUSION

77. Based on this review, and the principles stated herein, we accordingly conclude that the strategic pricing under investigation in this proceeding must be justified under the guidelines set forth above.[57] We are therefore directing carriers to supplement the record as detailed above and providing interested persons with an opportunity to comment on those supplemental filings. Once we have reviewed the supplemental filings, we will, in an expeditious manner, determine the lawfulness of the rates under investigation and order such relief as may be justified.

VI. ORDERING CLAUSES

78. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201(b), 204(a), and 205 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 204(a), 205, that carriers that filed special access rates which took effect subject to this investigation of strategic pricing shall file no later than 30 days after release of this order supplemental direct cases in which they justify such rates under the guidelines and analysis set forth herein. Such direct cases shall include any empirical data or information upon which a carrier relies.

79. IT IS FURTHER ORDERED that parties wishing to challenge any direct case shall do so in an opposition to be filed no later than 20 days after the time has expired for the filing of direct cases.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

Attachment A

PLEADINGS IN CC DOCKET NO. 85-166, PHASE II, PART 1 COMMENTING ON STRATEGIC PRICING

1. Direct Cases

The Ameritech Operating Companies

The Bell Atlantic Companies

National Exchange Carrier Association

Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company

The NYNEX Telephone Companies

Pacific Bell

2. Comments and Oppositions

The Ad Hoc Telecommunications Users Committee

Aeronautical Radio, Inc.

American Telephone and Telegraph Company

Dow Jones and Company, Inc.

The GTE Telephone Operating Companies

The Independent Data Communications Manufacturers Association

MCI Telecommunications Corporation

The Western Union Telegraph Company

3. Rebuttals

The Ameritech Operating Companies

The Bell Atlantic Companies

BellSouth Corporation

National Exchange Carrier Association

The NYNEX Telephone Companies

The US West Operating Companies

Pacific Bell

Southwestern Bell Telephone Company

Attachment B

PLEADINGS IN THE ANNUAL 1987 ACCESS TARIFF FILING PROCEEDING RELATING TO STRATEGIC PRICING

1. Petitions to Reject, and/or Suspend and Investigate

The Ad Hoc Telecommunications Users Committee

Aeronautical Radio, Inc.

The Competitive Telecommunications Association

Dow Jones and Company

The Independent Data Communications Manufacturers Association

The Information Industry Association

ITT Communications Services, Inc.

The Press Parties (Associated Press and Satellite Data Broadcast Networks, Inc.)

Telecommunications Systems, Inc.

2. Replies

The Ameritech Operating Companies

The Bell Atlantic Companies

Bell South Corporation

The NYNEX Telephone Companies

The US West Operating Companies

Pacific Bell

Southern New England Telephone Company

Attachment C
PLEADINGS IN THE ANNUAL 1988 ACCESS TARIFF FILINGS PROCEEDING RELATING TO STRATEGIC PRICING

1. Petitions to Reject and/or Suspend and Investigate

Ad Hoc Telecommunications Users Committee

American Petroleum Institute

Aeronautical Radio, Inc.

American Telephone and Telegraph Company

Independent Data Communications Manufacturers Association, Inc.

Local Area Telecommunications, Inc.

United States Transmission Systems, Inc.

2. Replies

The Ameritech Operating Companies

The Bell Atlantic Companies

BellSouth Corporation

GTE Telephone Companies

The US West Operating Companies

The NYNEX Telephone Companies

Pacific Bell

Southern New England Telephone Company

Southwestern Bell Telephone Company

3. Supplemental Comments

Ad Hoc Telecommunications Users Committee

American Petroleum Institute

Aeronautical Radio, Inc.

American Telephone and Telegraph Company

Independent Data Communications Manufacturers Association, Inc.

International Communications Association

United States Transmission Systems, Inc.

ATTACHMENT D

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GROWTH TRENDS FOR SPECIAL ACCESS CIRCUITS

VOICE GRADE

DATA SOURCE: DMD4 87 & 88 TRP

				ANNUALIZED	
	ACTUAL 6/85-5/86 VG CKTS	ACTUAL 7/86-6/87 VG CKTS	PROSPECTIVE 1/88-12/88 VG CKTS	ACTUAL % CHANGE	PROSPECTIVE % CHANGE
HOLDING COMPANIES (BOCS)	COL A	COL B	COL C	(B-A)/A	(C-B)/B X 2/3
AMERITECH	191,842	187,105	166,460	-2.47%	-7.36%
BELL ATLANTIC	163,414	138,305	113,039	-15.37%	-12.18%
BELL SOUTH	171,934	169,175	143,915	-1.60%	-9.95%
NYNEX	233,858	240,206	219,550	2.75%	-5.75%
PACIFIC	147,234	133,388	70,090	-9.40%	-31.64%
SOUTHWESTERN BELL TEL. CO.	150,672	152,382	106,084	1.13%	-20.26%
U.S. WEST	123,049	119,267	103,543	-3.07%	-8.79%
TOTAL DIVESTED BELL OCs	1,182,003	1,139,908	922,681	-3.56%	-12.70%
OPERATING COMPANIES (BOCS)					
ILLINOIS BELL	81,009	76,183	68,445	-5.96%	-6.77%
INDIANA BELL	16,433	16,731	14,923	1.81%	-7.20%
MICHIGAN BELL	39,097	39,167	31,770	0.18%	-12.59%
OHIO BELL	39,373	39,353	36,194	-0.05%	-5.35%
WISCONSIN BELL	15,930	15,671	15,128	-1.63%	-2.31%
C & P (D.C.)	17,154	16,735	13,325	-2.44%	-13.58%
C & P of MARYLAND	19,746	18,214	15,385	-7.76%	-10.35%
C & P of VIRGINIA	20,723	19,744	17,006	-4.72%	-9.25%
C & P OF WEST VIRGINIA	2,847	2,791	2,561	-1.97%	-5.49%
DIAMOND STATE TEL.	2,905	3,098	2,879	6.64%	-4.71%
BELL OF PENNSYLVANIA	38,621	34,829	23,345	-9.82%	-21.98%
NEW JERSEY BELL	61,418	42,894	38,538	-30.16%	-6.77%
SOUTHERN BELL	112,793	107,849	90,730	-4.38%	-10.58%
SOUTH CENTRAL BELL	59,141	61,326	53,185	3.69%	-8.85%
NEW ENGLAND TELEPHONE	59,943	52,546	44,570	-12.34%	-10.12%
NEW YORK TELEPHONE	173,915	187,740	174,982	7.95%	-4.53%
PACIFIC BELL	147,234	132,388	69,205	-10.08%	-31.82%
NEVADA BELL	0	1,000	885	ERR	-7.67%
SOUTHWESTERN BELL TEL. CO.	150,672	152,382	106,084	1.13%	-20.26%
MOUNTAIN BELL	49,851	47,320	38,379	-5.08%	-12.60%
NORTHWESTERN BELL	42,175	46,595	40,553	10.48%	-8.65%
PACIFIC NORTHWEST BELL	31,023	25,351	24,611	-18.28%	-1.95%
SELECTED ICOS					
CINCINNATI BELL TELEPHONE	13,270	12,745	10,490	-3.96%	-11.80%
SOUTHERN NEW ENGLAND TELEPHONE	27,341	24,733	22,268	-9.54%	-6.64%

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GROWTH TRENDS FOR SPECIAL ACCESS CIRCUITS
HIGH CAPACITY

DATA SOURCE: DMD4 87 & 88 TRP

				ANNUALIZED	
	ACTUAL 6/85-5/86 HICAP CKTS	ACTUAL 7/86-6/87 HICAP CKTS	PROSPECTIVE 1/88-12/88 HICAP CKTS	ACTUAL % CHANGE	PROSPECTIVE % CHANGE
HOLDING COMPANIES (BOCS)	COL A	COL B	COL C	(B-A)/A	(C-B)/B X 2/3
AMERITECH	2,530	5,899	9,726	113.40%	53.43%
BELL ATLANTIC	3,898	6,679	9,670	71.34%	29.85%
BELL SOUTH	3,132	6,454	7,565	106.07%	11.48%
NYNEX	4,462	7,727	11,482	73.17%	32.40%
PACIFIC	3,153	4,753	5,163	50.75%	5.75%
SOUTHWESTERN BELL TEL. CO.	3,214	6,514	7,476	102.68%	9.85%
U.S. WEST	3,423	9,376	8,838	173.91%	-3.83%
TOTAL DIVESTED BELL OCs	23,812	46,902	59,920	96.97%	18.50%
OPERATING COMPANIES (BOCS)					
ILLINOIS BELL	1,687	2,549	3,389	51.10%	21.97%
INDIANA BELL	62	289	962	366.13%	155.25%
MICHIGAN BELL	462	1,260	2,186	172.73%	48.99%
OHIO BELL	266	1,065	2,573	300.38%	94.40%
WISCONSIN BELL	53	236	616	345.28%	107.34%
C & P (D.C.)	525	583	725	11.05%	16.24%
C & P of MARYLAND	488	765	1,102	56.76%	29.37%
C & P of VIRGINIA	471	804	1,332	70.70%	43.78%
C & P OF WEST VIRGINIA	4	29	89	625.00%	137.93%
DIAMOND STATE TEL.	38	83	128	118.42%	36.14%
BELL OF PENNSYLVANIA	764	1,670	2,939	118.59%	50.66%
NEW JERSEY BELL	1,608	2,745	3,355	70.71%	14.81%
SOUTHERN BELL	2,276	4,869	5,145	113.93%	3.78%
SOUTH CENTRAL BELL	856	1,585	2,420	85.16%	35.12%
NEW ENGLAND TELEPHONE	995	2,256	3,330	126.73%	31.74%
NEW YORK TELEPHONE	3,467	5,471	8,152	57.80%	32.67%
PACIFIC BELL	3,153	4,709	5,070	49.35%	5.11%
NEVADA BELL	0	44	93	ERR	74.24%
SOUTHWESTERN BELL TEL. CO.	3,214	6,514	7,476	102.68%	9.85%
MOUNTAIN BELL	1,199	3,609	4,421	216.86%	15.00%
NORTHWESTERN BELL	764	1,675	3,488	119.24%	70.17%
PACIFIC NORTHWEST BELL	1,520	4,092	979	169.21%	-50.72%
SELECTED ICOS					
CINCINNATI BELL TELEPHONE	146	323	738	121.23%	85.66%
SOUTHERN NEW ENGLAND TELEPHONE	445	757	1,132	70.11%	33.03%

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GROWTH TRENDS FOR SPECIAL ACCESS CIRCUITS

DIGITAL DATA SERVICE

DATA SOURCE: DMD4 87 & 88 TRP

HOLDING COMPANIES (BOCS)	ACTUAL 6/85-5/86 DDS CKTS COL A	ACTUAL 7/86-6/87 DDS CKTS COL B	PROSPECTIVE 1/88-12/88 DDS CKTS COL C	ANNUALIZED ACTUAL % CHANGE (B-A)/A	ANNUALIZED PROSPECTIVE % CHANGE (C-B)/B X 2/3
AMERITECH	9,458	9,874	9,844	4.40%	-0.20%
BELL ATLANTIC	8,385	9,495	8,593	13.24%	-6.33%
BELL SOUTH	11,470	9,188	9,511	-19.90%	2.34%
NYNEX	7,062	8,389	9,821	18.79%	11.38%
PACIFIC	7,882	8,680	31,766	10.12%	177.31%
SOUTHWESTERN BELL TEL. CO.	6,453	6,649	5,871	3.04%	-7.80%
U.S. WEST	5,263	7,150	8,201	35.85%	9.80%
TOTAL DIVESTED BELL OCs	55,973	59,425	83,607	6.17%	27.13%
OPERATING COMPANIES (BOCS)					
ILLINOIS BELL	4,282	4,328	4,722	1.07%	6.07%
INDIANA BELL	350	465	501	32.86%	5.16%
MICHIGAN BELL	2,193	2,313	1,947	5.47%	-10.55%
OHIO BELL	2,052	2,073	1,956	1.02%	-3.76%
WISCONSIN BELL	501	695	718	19.62%	2.21%
C & P (D.C.)	2,232	1,375	1,506	-38.40%	6.35%
C & P of MARYLAND	610	1,186	1,269	94.43%	4.67%
C & P of VIRGINIA	436	1,220	1,356	179.82%	7.43%
C & P OF WEST VIRGINIA	0	2	2	ERR	0.00%
DIAMOND STATE TEL.	79	98	103	24.05%	3.40%
BELL OF PENNSYLVANIA	911	1,743	2,077	91.33%	12.77%
NEW JERSEY BELL	4,117	3,871	2,280	-5.98%	-27.40%
SOUTHERN BELL	8,345	6,917	7,385	-17.11%	4.51%
SOUTH CENTRAL BELL	3,125	2,271	2,126	-27.33%	-4.26%
NEW ENGLAND TELEPHONE	2,015	2,218	2,548	10.07%	9.92%
NEW YORK TELEPHONE	5,047	6,171	7,273	22.27%	11.91%
PACIFIC BELL	7,882	8,992	31,661	9.01%	179.00%
NEVADA BELL	0	88	105	ERR	12.88%
SOUTHWESTERN BELL TEL. CO.	6,453	6,649	5,871	3.04%	-7.80%
MOUNTAIN BELL	2,770	3,057	3,499	10.36%	9.64%
NORTHWESTERN BELL	1,374	2,027	3,661	47.53%	53.74%
PACIFIC NORTHWEST BELL	1,119	2,066	1,041	84.63%	-33.08%
SELECTED ICOS					
CINCINNATI BELL TELEPHONE	576	588	697	2.08%	12.36%
SOUTHERN NEW ENGLAND TELEPHONE	1,059	1,009	1,081	-4.72%	4.76%

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GROWTH TRENDS FOR SPECIAL ACCESS CIRCUITS
(SUMMARY OF ACTUAL & PROSPECTIVE ANNUALIZED GROWTH RATES)

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DATA SOURCE: DMD4 87 & 88 TRP

	VOICE GRADE ACTUAL % CHANGE	HICAP ACTUAL % CHANGE	DDS ACTUAL % CHANGE	VOICE GRADE PROSPECTIVE % CHANGE	HICAP PROSPECTIVE % CHANGE	DDS PROSPECTIVE % CHANGE
SOURCE: >>	PAGE 1	PAGE 2	PAGE 3	PAGE 1	PAGE 2	PAGE 3
HOLDING COMPANIES (BOCS)						
AMERITECH	-2.47%	113.40%	4.40%	-7.36%	53.43%	-0.20%
BELL ATLANTIC	-15.37%	71.34%	13.24%	-12.18%	29.85%	-6.33%
BELL SOUTH	-1.60%	106.07%	-19.90%	-9.95%	11.48%	2.34%
NYNEX	2.75%	73.17%	18.79%	-5.75%	32.40%	11.38%
PACIFIC	-9.40%	50.75%	10.12%	-31.64%	5.75%	177.31%
SOUTHWESTERN BELL TEL. CO.	1.13%	102.68%	3.04%	-20.26%	9.65%	-7.80%
U.S. WEST	-3.07%	173.91%	35.85%	-8.79%	-3.63%	9.80%
TOTAL DIVESTED BELL OCs	-3.86%	96.97%	6.17%	-12.70%	18.10%	27.13%
OPERATING COMPANIES (BOCS)						
ILLINOIS BELL	-5.96%	51.10%	1.07%	-6.77%	21.57%	6.07%
INDIANA BELL	1.81%	366.13%	32.86%	-7.20%	155.25%	5.16%
MICHIGAN BELL	0.18%	172.73%	5.47%	-12.59%	48.93%	-10.55%
OHIO BELL	-0.05%	300.38%	1.02%	-5.35%	94.40%	-3.76%
WISCONSIN BELL	-1.63%	345.28%	19.62%	-2.31%	107.34%	2.21%
C & P (D.C.)	-2.44%	11.05%	-38.40%	-13.58%	16.24%	6.35%
C & P of MARYLAND	-7.76%	56.76%	94.43%	-10.35%	29.37%	4.67%
C & P of VIRGINIA	-4.72%	70.70%	179.82%	-9.25%	43.78%	7.43%
C & P OF WEST VIRGINIA	-1.97%	625.00%	ERR	-5.49%	137.53%	0.00%
DIAMOND STATE TEL.	6.64%	118.42%	24.05%	-4.71%	36.14%	3.40%
BELL OF PENNSYLVANIA	-9.82%	118.59%	91.33%	-21.98%	50.65%	12.77%
NEW JERSEY BELL	-30.16%	70.71%	-5.98%	-6.77%	14.81%	-27.40%
SOUTHERN BELL	-4.38%	113.93%	-17.11%	-10.88%	3.73%	4.51%
SOUTH CENTRAL BELL	3.69%	85.16%	-27.33%	-8.85%	35.13%	-4.26%
NEW ENGLAND TELEPHONE	-12.34%	126.73%	10.07%	-10.12%	31.74%	9.92%
NEW YORK TELEPHONE	7.95%	57.80%	22.27%	-4.53%	32.67%	11.91%
PACIFIC BELL	-10.08%	49.35%	9.01%	-31.82%	5.11%	179.00%
NEVADA BELL	ERR	ERR	ERR	-7.67%	74.24%	12.88%
SOUTHWESTERN BELL TEL. CO.	1.13%	102.68%	3.04%	-20.26%	9.65%	-7.80%
MOUNTAIN BELL	-5.08%	216.86%	10.36%	-12.60%	15.07%	9.64%
NORTHWESTERN BELL	10.48%	119.24%	47.53%	-8.65%	70.17%	53.74%
PACIFIC NORTHWEST BELL	-18.28%	169.21%	84.63%	-1.95%	-50.72%	-33.08%
SELECTED ICOS						
CINCINNATI BELL TELEPHONE	-3.96%	121.23%	2.08%	-11.80%	85.65%	12.36%
SOUTHERN NEW ENGLAND TELEPHONE	-9.54%	70.11%	-4.72%	-6.64%	33.03%	4.76%

FOOTNOTES

[1] The Common Carrier Bureau initiated this docket to investigate special access rate levels, rate structures, and rate relationships arising from the special access tariffs that became effective on or about April 1, 1985. *See* Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Mimeo No. 4726, released May 24, 1985 (*May 24 Designation Order*). We have completed our investigation of most of the rate structure and cost allocation issues, Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, FCC 86-52, released Jan. 24, 1986, *aff'd on review*, 1 FCC Rcd 427 (1986); the special access rate levels of certain carriers, Investigation of Special Access Tariffs of Local Exchange Carriers, Mimeo No. 3436, released Mar. 27, 1986, *recon. pending*; and non-recurring charges, Investigation of Interstate Access Tariff Non-Recurring Charges, CC Docket No. 85-166, Phase I, Part 3, 2 FCC Rcd 3498 (1987) (*NRC Order*), *recon. pending*.

[2] *See* Annual 1985 Access Tariff Filings, Mimeo No. 7401, released Sept. 30, 1985 at paras. 60-62.

[3] Annual 1985 Access Tariff Filings, Mimeo No. 7401, released Sept. 30, 1985 (*September 30 Order*), *aff'd on review*, FCC 86-379, released Sept. 2, 1986 (*1985 Access Tariff Review Order*).

[4] *September 30 Order* at paras. 60-62, 125.

[5] *See 1985 Access Tariff Review Order*.

[6] *See* note 1, *supra*.

[7] *See* note 2, *supra*.

[8] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Mimeo No. 2057, released Jan. 17, 1986.

[9] Attachment A contains a list of the LECs that filed direct cases in Docket 85-166 addressing strategic pricing issues and those parties that filed responsive pleadings.

[10] Attachment B contains a list of the pleadings in the Annual 1987 Access Tariff proceeding which addressed the LECs' strategic pricing of HiCap and DDS in the October 3, 1986, tariff revisions.

[11] But see para. 35, *infra*.

[12] Annual 1987 Access Tariff Filings, 2 FCC Rcd 280 (1986) *December 31 Order*), *aff'd on review*, 2 FCC Rcd 4725 (1987) (*1987 Access Tariff Review Order*).

[13] Investigation of Special Access Tariffs of Local Exchange Carriers, 2 FCC Rcd 3507 (1987) (*May 29 Order*). The Bureau suspended and, after investigation, found unlawful: New York Telephone's proposed rates for DDS service; BellSouth's rates for HiCap in Mississippi; Mountain Bell's rates for HiCap in Idaho, Utah, and New Mexico; Illinois Bell's rates for HiCap and DDS; and Michigan Bell's rates for HiCap.

[14] Attachment C contains a list of pleadings in the Annual 1988 Access Tariff Proceeding which addressed the LECs' strategic pricing of HiCap and DDS.

[15] Thus, the record in this investigation consists of: the direct cases and responsive pleadings filed in Phase II of the Docket 85-166 investigation relating to strategic pricing of special access services; the information filed in support of strategically set rates in the 1985, 1987, and 1988 annual access tariff proceedings; and the disaggregated special access data filed by the LECs with their annual 1987 access tariff filings.

[16] The Bureau also initiated a new investigation of issues that may affect HiCap and DDS rates, among others. *See* Annual 1988 Access Tariff Filings, 3 FCC Rcd 1281 (1987).

[17] Special access users typically pay a flat rate per month while switched users pay a charge per minute. Thus, as a switched user's minutes of use increase past the point at which it generates total per minute charges equal to the monthly special access charges, the user has an incentive to switch to special access.

[18] Docket 85-166, Phase II, Direct Case of Pacific Bell at 17.

[19] Docket 85-166, Phase II, Direct Case of Pacific Bell at 17.

[20] *See* Annual 1987 Access Tariff Filings, Reply of the NYNEX Telephone Companies, Vol. II at 4, filed Nov. 13, 1986.

[21] *See* the *May 28 Order* where the Bureau summarized the LECs' arguments in the Annual 1987 Access Tariff Proceeding in support of crossover points.

[22] Ameritech Operating Companies Direct Case at 15-19, filed Feb. 14, 1986.

[23] Annual 1987 Access Tariff Filings, Reply of the NYNEX Telephone Companies, Vol. II at 8.

[24] *See, e.g.*, Annual 1987 Access Tariff Filings, Reply of US West at 56, filed Nov. 13, 1986, and of Ameritech Operating Companies at 51-56, filed Nov. 13, 1986.

[25] BellSouth Rebuttal at 7, filed Mar.14, 1986.

[26] Reply Comments of Bell Atlantic at 12, filed Mar. 9, 1986.

[27] Investigation of Interstate Access Tariff Non-Recurring Charges, CC Docket No. 85-166, Phase I, Part 3, 2 FCC Rcd 3498 (1987).

[28] Reply Comments of Bell Atlantic at 11, filed Mar. 14, 1986.

[29] Pacific Bell Rebuttal at 28-29, filed Mar. 14, 1986.

[30] *See, e.g.*, Annual 1987 Access Tariff Filings, Reply of Bell Atlantic at App. A, pp. 2-3; Reply of the NYNEX Telephone Companies, Vol. II at 20-23. *See also* Docket 85-166, Direct Case of Bell Atlantic at 8-9, filed Feb. 18, 1986.

[31] *See, e.g.*, Docket 85-166, Opposition to Direct Cases of Ad Hoc Telecommunications Users Committee, filed Mar. 7, 1986; Opposition of the Independent Data Communications Manufacturers Association, filed Mar. 7, 1986; Annual 1987 Access Tariff Filings, Petition for Partial Rejection, Suspension and/or Investigation of Ad Hoc, filed Oct. 28, 1986; Annual 1988 Access Tariff Filings, Petition for Rejection, and/or Suspension and Investigation of Ad Hoc, filed Oct. 29, 1987; Petition to Reject or, in the Alternative, Suspend and Investigate of the International Data Communications Manufacturers Association, Inc., filed Oct. 29, 1987.

[32] IDCMA Opposition, App. A, filed Mar. 7, 1986.

[33] AT&T Opposition at 14-15, filed Mar. 7, 1986.

[34] Annual 1987 Access Tariff Filings, Ad Hoc Petition at 51.

[35] *United States v. AT & T*, 552 F. Supp. 131, App. B, § B.2 (1982), *aff'd sub nom. Maryland v. United States*, 103 S. Ct. 1240 (1981): "[T]he charges for each type of exchange access shall be cost justified and any difference in charges to carriers shall be cost justified on the basis of differences in services provided."

[36] MTS and WATS Market Structure, 97 FCC 2d 682, 688 (1983).

[37] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, FCC No. 86-52, released Jan. 24, 1986; Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part 1, FCC 86-54, released Jan. 24, 1986.

[38] Annual 1985 Access Tariff Filings, Ad Hoc Application for Review at 17, filed Oct. 31, 1985.

[39] Annual 1987 Access Tariff Filings, Ad Hoc Petition at 25-31.

[40] Annual 1987 Access Tariff Filings, Petition of MCI To Reject or Suspend and Investigate at 46, filed Oct. 28, 1986.

[41] *See* American Telephone and Telegraph Company, 59 F.C.C. 2d 671 (1976), *aff'd, MCI v. FCC*, 200 US App D.C. 269 (1980).

[42] Annual 1988 Access Tariff Filings, Petition of IDCMA at 4, 13.

[43] IDCMA Opposition, App. A at 4-5, filed Mar. 7, 1986.

[44] *Id.* at 8.

[45] Annual 1987 Access Tariff Filings, Petition of Ad Hoc at 23; Opposition of IDCMA at 15-17, filed Mar. 7, 1986.

[46] The problems associated with developing a meaningful cost allocation system are discussed at length in our cost allocation order. *See* Separation of Costs of Regulated Telephone Service from Costs of Non-Regulated Activities, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987), *on recon;* 2 FCC Rcd 6283 (1987). In that order, we reviewed the difficulties encountered in our earlier efforts to allocate AT&T's costs among various categories of regulated services and concluded that "[i]t may, however, have been in fact impossible to attribute AT&T's investment in telecommunications plant to particular private line offerings on a cost-causative basis, due both to the extreme fungibility of the plant and to the high degree of substitutability amongst the services." *Id.* at 1301. In the *Cost Allocation Order*, we adopted the attributable cost method for distinguishing between costs that should be allocated to regulated activities and costs that should be allocated to unregulated activities. The attributable cost method allocates overhead costs in proportion to the costs that can be directly attributed to various services. *Id.* at 1313. It produces an economically meaningful allocation when a substantial portion of the cost can be directly attributed, as is the case when distinquishing between regulated and non-regulated activities. However, the attributable cost method is much less satisfactory for allocating costs among sub-elements of the special access category because so high a percentage of the costs of the various sub-elements are incurred jointly and thus cannot be directly attributed.

[47] With respect to AT&T's argument that non-cost-based rates violate the Modification of Final Judgment, two points should be made. First, AT&T only cites language from the decree requiring cost justification, and this language does not appear to differ in intent from this Commission's own Rules. AT&T does not indicate that it has sought a ruling from the decree court that the language is a substantive restriction on rates. Second, even if the language were to be so interpreted, we do not believe it acts as a constraint on this Commission's ratemaking authority.

[48] *See* Illinois Bell Transmittal No. 734, filed July 2, 1985, reducing the recurring rate for a second DS 1 from $478.35 per month to $212.76 and New York Telephone Transmittal No. 859, filed Oct. 2, 1987, reducing the HiCap rate by an average of 11.7 percent and DDS rates by 25 percent.

[49] AT&T's statement, that as of January, 1986, 80 percent of HiCap facilities were used to provide private line services or for voice grade switched services which the LECs themselves elected to provision with HiCap-type facilities, does not differentiate between these two uses nor does it reflect the rapid growth in service bypass services using HiCap since that date.

[50] IDCMA Opposition, App. A at 4-5.

[51] *See* Annual 1987 Access Tariff Filings, Petition for Clarification and/or Application for Review of Ad Hoc Telecommunications Users Committee, filed Jan. 30, 1987. We recently rejected Ad Hoc's proposal of an 18 percent cap on strategic rate levels in Annual 1987 Access Tariff Filings, 3 FCC Rcd 749 (1988).

[52] We reject the argument of some parties that strategic pricing is inconsistent with our decision in AT&T, supr a, note 41. Our consideration of the cost hierarchy underlying subelement rates, our prescription of a category rate of return, and our inclusion of both in our guidelines, infr a, establish ratemaking principles that are consistent with our decision in that case that costs are the benchmark for ratemaking.

[53] *See* Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923 (1984) *(Volume Discount Practices Order)*.

[54] Such rates include the carriers' DDS rates. Although our discussion focuses on HiCap rates, we expect the carriers to address the DDS rates under investigation herein in their supplemental direct cases.

[55] MTS and WATS Market Structure, 2 FCC Rcd. 2953 (1987).

[56] *See* note 27, *supra*.

[57] We recognize that the Bureau utilized a rate of return approach in concluding that some of the proposed strategically-based rate increases in the 1987 annual access tariff filing were unlawful. Our decision to adopt a different approach for the rates under investigation herein does not affect the finality of that decision. *See* Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, 2 FCC Rcd 3507 (1987).

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II Part 1

I write separately to emphasize two points. First, the Commission's action here is inconsistent with the Order's finding that the cost allocation process "is in substantial part an arbitrary process", Order at para. 51. Second, while the prevention of uneconomic service bypass and stranded investment could justify "strategic" pricing, the carriers have not met their burden to show that such pricing was necessary to avoid these harms.

A. Costs

The Commission must evaluate the reasonableness of particular rates in this investigation. The Order states that although costs are the benchmark for ratemaking, the calculation of rates of return for HiCap service are not reliable or meaningful because there are many reasonable ways of allocating costs. It, therefore, concludes that it is unrealistic "to attempt to establish a specific level for reasonable HiCap rates." Order at para. 74.

It defies logic for the Order to state at one point that a uniform subelement cost allocation methodology is an arbitrary process while later stating at para. 75 that a 6:1 ratio between HiCap and voice grade rates "is a reasonable benchmark for the cost relationship between voice grade and HiCap services." The illogic is that the relied-upon ratio itself is based upon a cost allocation process.

Notwithstanding the Order's internal inconsistencies concerning the cost allocation process, the Commission must continue to rely on costs for another reason: the Commission's guidelines require the carriers to demonstrate that their rates for special access services are consistent with the hierarchy of underlying costs for those

services. Consequently, we must examine the reasonableness of the cost allocation methodology the carriers employ in developing such a hierarchy.

B. Bypass and Stranded Investment

Turning to my second point, I wish to underscore the Order's warning that the Commission will not accept generalized contentions that factors other than costs are sufficient to support a particular rate level. While deterring uneconomic service bypass and avoiding stranded investment may justify strategic pricing in principle, the LECs must demonstrate a factual basis for such arguments in the date they will file.

Although deterring uneconomic service bypass of switched access could justify strategic pricing of HiCap, such pricing may simply shift the incentive to engage in service bypass from private lines. Special access costs are allocated in a gross amount which is then recovered from the various special access services. Thus, pricing HiCap for above "cost "* probably means that other special access services are priced lower than they would be absent strategic pricing of HiCap; otherwise, total special access costs might be over-recovered.

Similarly, while the management of HiCap demand through strategic pricing to prevent stranding of facilities may be reasonable, much of the plant providing voice grade special access service that is made redundant by HiCap is reusable for other services such as local exchange service or jurisdictionally intrastate private line service. Because the extent of reuse is not clear from the record, the Order's assertion that "the absolute decline in voice grade traffic clearly demonstrates that in-place facilities are no longer being used" is speculative.

Rather than not being used, it is as likely that unused trunk plant would be returned to the pool of spare facilities for reuse by other services, including switched services. To the extent that communications demand continues to grow, the availability of these spare facilities reduces the need for additional construction.

However, under current separations practices, the reduction in working loops resulting from the substitution of HiCap for multiple voice grade private lines could result in the assignment of more spare loops and hence more costs to switched access. It does not appear, though, that such increases would be substantial in comparison to the magnitude of costs currently assigned to common line.

* As defined by the figures submitted by the carriers which were the basis for the May 29 Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-563

In the Matter of

Amendment of Section 73.202(b),	RM-6078
Table of Allotments,	RM-6710
FM Broadcast Stations.	
(Dyersburg, Tennessee; De Witt,	
Heber Springs, Hoxie, Jonesboro,	
and Newport, Arkansas)[1]	

FURTHER NOTICE OF PROPOSED RULE MAKING AND ORDERS TO SHOW CAUSE

Adopted: May 22, 1989; Released: June 12, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making and Orders to Show Cause*, 2 FCC Rcd 7466 (1987), issued in response to the request of Dr Pepper Pepsi-Cola Bottling Company of Dyersburg, Inc. ("Dr Pepper"), licensee of Station WASL(FM), Channel 261A, Dyersburg, Tennessee, proposing the substitution of Channel 261C2 for Channel 261A at Dyersburg. The *Notice* also proposed channel substitutions at Jonesboro, Arkansas (Channel 262A for Channel 261A), Newport, Arkansas (Channel 264A for Channel 288A), and Hoxie, Arkansas (Channel 287A for Channel 263A), in order to accomplish the station upgrade at Dyersburg. We issued *Orders to Show Cause* to MSB Communications Corporation ("MSB"), licensee of Station KDEZ(FM) at Jonesboro, Newport Broadcasting Co. ("Newport Broadcasting"), licensee of Station KOKR(FM) at Newport, and Dennis Harold Mitchell ("Mitchell"), permittee[2] of Channel 263A at Hoxie, directing them to demonstrate in comments why their facilities should not be modified to specify operation on Channels 262A, 264A and 287A, in lieu of Channels 261A, 288A and 263A, respectively.

2. Dr Pepper filed comments reiterating its intention to take "all steps necessary" to construct the higher powered facilities at Dyersburg. Dr Pepper included with its comments MSB's "Reply Comments," originally advanced in a separate proceeding, which set forth a counterproposal to upgrade Station KDEZ(FM) at Jonesboro to Class C1 Channel 263.[3] Newport Broadcasting responded to the *Order to Show Cause* with a counterproposal for improving its facilities to a Class C2 station and an erratum thereto.[4] Dr Pepper responded to Newport Broadcasting's counterproposal.[5] Mitchell failed to file comments in response to the *Order to Show Cause*, but filed reply comments. MSB also filed reply comments.[6]

COUNTERPROPOSALS

3. MSB states its support for the Dyersburg proposal, and offers a counterproposal to permit the upgrade of its broadcast service at Jonesboro. MSB contends that the reallotment of the Newport station is not necessary and would preclude its opportunity to improve service at Jonesboro. MSB suggests that in addition to the substitution of Channel 261C2 for Channel 261A at Dyersburg, that it be permitted to modify the license for Station KDEZ(FM) at Jonesboro to specify operation on Channel 263C1 in lieu of Channel 261A. MSB also suggests the substitution of Channel 245A, rather than Channel 287A, for Channel 263A at Hoxie, Arkansas. MSB notes that, using Channel 245A, Mitchell must relocate the transmitter site for the Hoxie station. The site relocation would be necessary to protect the spacing requirements to Station WHRK(FM), Channel 246C1 at Memphis, Tennessee. MSB acknowledges its willingness to share with Dr Pepper the financial responsibility for reimbursing Mitchell for his expenses incurred in changing facilities. MSB claims that Mitchell has verbally agreed to accept the channel change, which calls for the relocation of his specified transmitter site. Dr Pepper endorsed the counterproposal.

4. In its counterproposal, Newport Broadcasting requests the substitution of Channel 244C2 for Channel 288A at Newport, and modification of its license for Station KOKR(FM) to specify operation on the higher powered channel. In order to accomplish the proposed substitution at Newport, it suggests the substitution of Channel 264C2 for Channel 244A at Heber Springs, Arkansas, the modification of the license for its co-owned Station KAWW-FM to specify the higher powered channel and the substitution of either Channel 225A, 227A, 229A, 247A, 275A or 247C2 for Channel 244A at De Witt, Arkansas, currently occupied by Station KDEW-FM. Newport Broadcasting asserts that its counterproposal and the reclassification of Station WASL(FM) from a Class A to a Class C2 facilities could provide a greater public interest benefit than the initial proposal. Newport Broadcasting contends that its counterproposal is protected from competing applications since it has been filed pursuant to Section 1.420(g)(3) of the Commission's Rules, which allows the modification of a station's license to a higher class channel if the channel is a co-channel or adjacent channel mutually exclusive with the existing license. In addition, Newport Broadcasting urges that if the Dr Pepper proposal is granted, it be "appropriately conditioned to require reimbursement" to the parties affected by the channel changes before it is allowed to construct.

COMMENTS

5. Newport Broadcasting argues that its counterproposal would bring the potential for improved service to four communities (Dyersburg, Newport, Heber Springs, and De Witt) as opposed to the Dr Pepper's proposal to provide improved service to only one community (Dyersburg). Consequently, Newport Broadcasting states that there are "substantial negative consequences" of Dr Pepper's proposal. Namely, it claims that three FM stations would be forced to involuntarily alter their channel positions, contrary to Commission policy. Newport Broadcasting cites *Columbus, Nebraska*, 59 RR 2d 1184 (1986), in which the Commission held that proposals to change the FM Table of Allotments which involve more than two

other substitutions of channels occupied by existing FM or TV stations would not be entertained. Newport Broadcasting alleges that since Mitchell has subsequently commenced operations on Channel 263A at Hoxie as a licensed station, the Hoxie station should be considered an "existing station" in accordance with *Columbus, Nebraska, supra*, and therefore, Dr Pepper's proposal should be considered to involve three stations in contravention of *Columbus, Nebraska*.

6. Mitchell, permittee of Station KHOC(FM), states that when the instant proposal was initiated Station KHOX(FM) at Hoxie was not in operation, but as of January 20, 1988, it has commenced operations and is an existing station. Thus, Mitchell claims that *Columbus, Nebraska supra*, should apply here. He objects to the counterproposal advanced by MSB suggesting the substitution of Channel 245A for Channel 263A at Hoxie and a change in transmitter site. Mitchell further states that he has never agreed to any changes in Station KHOX(FM). Mitchell argues that MSB has failed to legally notify him of its proposal.

7. Newport Broadcasting acknowledges that its counterproposal poses a potential "duopoly" problem because of the proximity between Stations KOKR(FM) and KAWW-FM. It states that if both stations are upgraded the "duopoly" problem could be alleviated by the use of directional antennas, reduced facilities or changes in the Rules.

DISCUSSION

8. Based on our engineering analysis we have determined that MSB's counterproposal to upgrade its facilities at Jonesboro is unacceptable for further consideration. MSB's proposal to substitute Channel 263C1 for Channel 261A at Jonesboro requires the substitution of Channel 245A for Channel 263A at Hoxie and the relocation of Station KHOX(FM)'s transmitter site. We find that, contrary to MSB's claim that Mitchell has consented to the proposed transmitter relocation, Mitchell objects to such change. Commission policy strongly disfavors forced transmitter site moves, absent countervailing public interest benefits significantly more compelling than those presented here. Therefore, we will not consider an alternative channel at Hoxie which requires the relocation of the station's transmitter site. *See North Charleston, South Carolina*, 47 FR 10560, March 11, 1982. Furthermore, Channel 263C1 cannot be allotted to Jonesboro in compliance with the Commission's technical requirements due to short spacings to Station WBLE(FM), Channel 263C2 at Batesville, Mississippi, and Station KGMO(FM), Channel 264C, Cape Girardeau, Missouri.

9. On the other hand, the Newport Broadcasting counterproposal suggesting channel substitutions at Newport (Channel 244C2 for Channel 288A), Heber Springs (Channel 264C2 for Channel 244A) and De Witt (an equivalent Class A or C2 for Channel 244A) can be accomplished in compliance with the Commission's minimum separation requirements. Channel 244C2 can be allotted to Newport with a site restriction of 17.3 kilometers (10.7 miles) southwest in order to avoid short spacings to Station KXOQ(FM), Channel 244A, Poplar Bluff, Missouri, and vacant but applied for Channel 244A at Mountain View, Missouri.[7] Additionally, in order to accomplish the allotment of Channel 244C2 at Newport, Channel 247A must be substituted for Channel 244A at De Witt.[8] The allotment of Channel 264C2 at Heber Springs requires a site restriction of 6.7 kilometers (4.2 miles) south of the city to avoid a short spacing to Station KFCM(FM), Channel 265A, Cherokee, Arkansas.[9]

10. However, Newport Broadcasting, as the licensee of Station KOKR(FM) at Newport and co-owned Station KAWW-FM at Heber Springs, is prohibited from upgrading both stations to maximum facilities because the proposal would appear to violate the Commission's "duopoly" rules. *See* Section 73.3555 of the Commission's Rules. The communities of Newport and Heber Springs are separated by 59.9 kilometers, whereas the minimum separation required to avoid prohibited overlap within the stations' principal city contours is 65.2 kilometers. We seek comments on whether, given the possible reduced public interest benefits accruing in light of these considerations, other options (e.g. upgrade of only the Newport or Heber Springs station) would prove more appropriate.

11. As stated in the *Notice*, the Commission's policy is not to entertain proposal for changes in the FM Table of Allotments which involve more than two other substitutions of channels occupied by existing FM or TV stations. *See Columbus, Nebraska*, 51 FR 4926, February 10, 1986. At the outset of this proceeding, the outstanding construction permit issued to Mitchell represented an unbuilt station. Subsequently, Mitchell became the licensee of Station KHOX(FM) at Hoxie. Although the *Columbus, Nebraska* decision spoke in terms of "licensee" and "existing stations," whereas a construction permit represents an "authorized station," it appears that the policy concerns underlying *Columbus, Nebraska* are now implicated and warrant now treating KHOX as an existing station for purposes of the "two other stations" substitution limit announced in that case. However, in view of the fact that, if Newport Broadcasting's counterproposal to upgrade the Newport station is granted, one of the three existing stations affected by the proposal would effectively consent to the change, we believe continued consideration of the proposal is warranted. In addition, we find that Mitchell has not responded to the *Show Cause Order* thus we deem him to have consented to the modification of his license as set forth in the *Notice*. We also find that Newport Broadcasting and MSB have lodged no substantial objection to the proposal. Therefore, in view of the aforementioned we find no reason to deny the Dyersburg proposal at the present time.

12. Channel 261C2 can be substituted for Channel 261A at Dyersburg, Tennessee, in compliance with the Commission's minimum spacing requirements with a site restriction of 6 kilometers (3.7 miles) west of Dyersburg.[10] In order to accomplish the upgrade at Dyersburg channel substitutions must be made at the Arkansas communities of Jonesboro (Channel 262A for Channel 261A), Hoxie (Channel 287A for Channel 263A) and Newport (Channel 264A for Channel 288A). The channel substitutions can be made at the current transmitter sites of Station KDEZ(FM) at Jonesboro, Station KHOX(FM) at Hoxie and Station KOKR(FM) at Newport.[11]

13. We have considered the arguments raised concerning the reimbursement requirements. Dr Pepper states its willingness to reimburse MSB, Newport Broadcasting and Mitchell for the reasonable costs incurred by changing frequencies, as required by Commission policy. Furthermore, Dr Pepper is expected to negotiate in good faith with MSB, Newport Broadcasting and Mitchell as to the extent of reimbursement to which each party is entitled,

in accordance with the established guidelines set forth in *Circleville, Ohio*, 8 FCC 2d 159 (1967). We note that if the upgrade of Station KOKR(FM) at Newport prevails herein Dr Pepper may no longer be required to reimburse Newport Broadcasting for changing its facilities.

14. In view of the aforementioned, we are issuing this *Further Notice* to solicit comments on proposals to substitute Channel 244C2 for Channel 288A at Newport, Arkansas, or to substitute Channel 264C2 for Channel 244A at Heber Springs, Arkansas. In addition, since the allotment of Channel 244C2 to Newport requires the channel substitution at De Witt, we are herein issuing a *Show Cause Order* to Quadras, Inc., the licensee of Station KDEW-FM at De Witt seeking comments as to why its license should not be modified to specify operation on Channel 247A in lieu of Channel 244A. We are also issuing a *Show Cause Order* to Newport Broadcasting, as the licensee of Station KAWW-FM at Heber Springs, seeking comments as to why its license should not be modified to specify operation on Channel 264A in lieu of Channel 244A. This additional notification to Newport Broadcasting is necessary in the event that another party expresses an interest in the non-adjacent higher powered channel at Newport. We will not accept counterproposals to the proposals set forth in the *Notice* nor to the proposals advanced in timely counterproposals to the *Notice*. The "cut-off" protection established in the *Notice* applies in both circumstances.

15. In this *Further Notice* we are also requesting that parties and any commenters address in comments the reimbursement requirements to existing stations expected to change frequencies. As stated in *Columbus, Nebraska, supra* at para 6:

> " . . . affected stations cannot be expected to incur significant expenses without the assurance of prompt reimbursement. For this reason, it is quite conceivable that we would require a licensee to demonstrate its financial ability to affected stations. Having the necessary funds available and placed in escrow would be a reasonable request by an affected station."

Commission policy requires that Station KDEW(FM) at De Witt be reimbursed for the reasonable costs of changing its frequency. Newport Broadcasting agrees to reimburse Station KDEW(FM) for changing its frequency. Additionally, Newport Broadcasting claims that Dr Pepper should share equally in the reimbursement of Station KDEW-FM at De Witt. We seek additional comments on its contention.

16. We reject Newport Broadcasting's claim that its counterproposal is protected from competing expressions of interest consistent with the adjacent channel upgrade provision of Section 1.420(g)(3) of the Commission's Rules.[12] Section 1.420(g)(3) allows the modification of a station's license to a higher class channel if the channel is a co-channel or adjacent channel mutually exclusive with the existing license. The Commission has acknowledged that it will consider analogous proposals involving channel substitutions at other communities which would be necessary to create a mutually exclusive relationship required under Section 1.420(g)(3), and determined to consider these "incompatible channel swaps" on a case-by-case basis. *See Modification of FM Broadcast License to Higher Class Co - Channels or Adjacent Channels*, 60 RR 2d 114 (1986). In a hypothetical case discussed in the *Order* adopting Section 1.420(g)(3), the Commission set out the factual situation it anticipated would trigger an incompatible channel swap. The contemplated situation involved a licensee on Channel 240A at community X seeking to upgrade to Channel 271C2. To do so, the licensee on Channel 240A proposes to exchange channels with a second licensee on Channel 270A in community Y, whose current operations are incompatible with the proposed upgrade, and who would modify its operations from Channel 270A to Channel 240A. The underlying rationale for the adjacent channel upgrade procedure is the recognition that only the petitioner can use the proposed channel, and, therefore, it would only unnecessarily place the existing station's authorization at risk to entertain competing applications for the proposed allotment. Therefore, if in the hypothetical Channel 240A were the only channel available to substitute for Channel 270A at community Y, allotting Channel 271C2 to community X and entertaining competing applications would serve no useful purpose, because unless the licensee at community X ceased operations Channel 240A would not be available for the necessary substitution at community Y. However, where, as here, some other Class A channel is available for substitution at community Y, the continued operation of the existing station in community X is not incompatible with the higher class allotment to community X. Specifically, we note that the Newport station can be upgraded from Channel 288A to Channel 244C2 without utilizing Channel 288A as the substitute channel for the necessary substitution at Heber Springs. Instead, Channel 264A is available. Likewise, the Heber Springs station can be upgraded from Channel 244A to 264C2 even if the Newport station were to remain on its existing Channel 288A. Therefore, we find that the allotment proposals advanced do not constitute "incompatible channel swaps," and will, therefore, not be treated like adjacent or co-channel upgrade requests.

17. Since both Channel 264C2 and Channel 244C2 are non-adjacent channel upgrades at Heber Springs and Newport, respectively, the Commission's policy requires consideration of competing expressions of interest. In the absence of an adjacent or co-channel upgrade or an incompatible channel swap, the Commission must consider competing expressions of interest for a proposed higher class channel, unless an additional equivalent class of channel is available which could accommodate those interests. Newport Broadcasting has failed to demonstrate that there are equivalent channels available which could accommodate competing expressions of interest.

18. As requested, we shall propose to modify the licenses of Newport Broadcasting for Stations KOKR(FM) at Newport and KAWW-FM at Heber Springs to specify operation on Channels 244C2 and 264C2, respectively. Since both channels represent non-adjacent upgrades, we may not modify the stations' license if another party expresses an interest in the proposed allotments, in accordance with Section 1.420(g) of the Commission's Rules. We herein advise interested parties wishing to apply for Channel 244C2 at Newport that they must state an intention to reimburse not only Station KDEW(FM) at De Witt, but also Station KAWW-FM at Heber Springs for changing frequencies.

19. Accordingly, the Commission believes it would be in the public interest to seek comments on the optional proposals to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

City	Channel No. Present	Proposed
	OPTION I	
De Witt, Arkansas	244A	247A
Heber Springs, Arkansas	244A	264A
Hoxie, Arkansas	263A	287A
Jonesboro, Arkansas	261A, 270C, 300C	262A, 270C, 300C
Newport, Arkansas	**288A**	**244C2**
Dyersburg, Tennessee	261A	261C2
	OPTION II	
Heber Springs, Arkansas	**244A**	**264C2**
Hoxie, Arkansas	263A	287A
Jonesboro, Arkansas	261A, 270C, 300C	262A, 270C, 300C
Newport, Arkansas	288A	244A
Dyersburg, Tennessee	261A	261C2
	OPTION III	
De Witt, Arkansas	244A	247A
Heber Springs, Arkansas	244A	264A
Newport, Arkansas	**288A**	**244C2, 288A**
	OPTION IV	
De Witt, Arkansas	244A	247A
Heber Springs, Arkansas	**244A**	**264C2**
Newport, Arkansas	**288A**	**244C2, 288A**
	OPTION V	
Heber Springs, Arkansas	**244A**	**244A, 264C2**
Hoxie, Arkansas	263A	287A
Jonesboro, Arkansas	261A, 270C, 300C	262A, 270C, 300C
Newport, Arkansas	288A	244A
Dyersburg, Tennessee	**261A**	**261C2**
	OPTION VI	
De Witt, Arkansas	244A	247A
Heber Springs, Arkansas	**244A**	**264C2**
Hoxie, Arkansas	263A	287A
Jonesboro, Arkansas	261A, 270C, 300C	262A, 270C, 300C
Newport, Arkansas	**288A**	**244C2**
Dyersburg, Tennessee	**261A**	**261C2**

20. We have set forth above optional plans which will permit either Newport (Option I) or Heber Springs (Option II) to receive a first wide coverage area FM service, as well as provide Dyersburg with its first wide coverage area FM service. Option III could provide Newport with its second local FM service. Option IV could provide expanded service at Heber Springs and a second local FM service at Newport. Option V could provide a second local FM service at Heber Springs and upgrade the facilities at Dyersburg. Option VI could permit Dyersburg, Heber Springs and Newport to receive a first wide coverage area FM service.

21. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Quadras, Inc., licensee of Station KDEW-FM, Channel 244A, De Witt, Arkansas, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 247A in lieu of Channel 244A.

22. Pursuant to Section 1.87 of the Commission's Rules, Quadras, Inc., may, not later than **August 3, 1989,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Quadras, Inc., to furnish additional information. If Quadras, Inc., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Quadras, Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be

issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

23. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Newport Broadcasting Co., licensee of Station KAWW-FM, Channel 244A, Heber Springs, Arkansas, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 264A in lieu of Channel 244A.

24. Pursuant to Section 1.87 of the Commission's Rules, Newport Broadcasting Co., may, not later than **August 3, 1989,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Newport Broadcasting Co., to furnish additional information. If Newport Broadcasting Co., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Newport Broadcasting Co., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

25. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Quadras, Inc.
P. O. Box 40
England, AR 72046

Newport Broadcasting Company
P. O. Box 989
Blytheville, AR 72315

26. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

27. Interested parties may file comments on or before **August 3, 1989,** and reply comments on or before **August 18, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the parties to the proceeding or their counsel or consultant, as follows:

Edward S. O'Neill, Esquire
Peggy Kobacker Shiffrin, Esquire
Bryan, Cave McPheeters and McRoberts
Suite 1000
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(Counsel for Dr Pepper)

Quadras, Inc.
P. O. Box 40
England, AR 72046

Dennis Harold Mitchell
309 S.E. 2nd Street
Walnut Ridge, AR 72476

Arthur H. Harding, Esquire
Fleischman and Walsh, P.C.
1725 N Street, N.W.
Washington, D.C. 20036
(Counsel for Newport Broadcasting Company)

Newport Broadcasting Company
P. O. Box 989
Blytheville, AR 72315

MSB Communications Corporation
1912 Woodsprings Road
Jonesboro, AR 72401

28. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

29. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The communities of Heber Springs and De Witt, Arkansas, have been added to the caption.

[2] On August 16, 1988, a license was granted for the construction permit of Station KHOX(FM) at Hoxie.

[3] MSB's counterproposal was initially advanced in MM Docket No. 87-356 as reply comments. In that proceeding the Commission allotted Channel 226A to Alamo, Tennessee, at the urging of MSB and the petitioner, in order to resolve a potential conflict. *See Alamo, Tennessee,* 53 FR 24941, July 1, 1988. Therefore, any further reference to the Alamo proceeding in comments in this proceeding warrants no discussion.

[4] Newport Broadcasting subsequently filed a "Motion for Leave to Substitute Amended Counterproposal and Response to Order to Show Cause." Newport Broadcasting states that its previous submission contained incomplete and inaccurate information due to an inadvertent lapse of communications between legal and engineering counsels. Newport Broadcasting, therefore, seeks to provide a revised copy of its counterproposal which accurately reflects its technical proposal. We have determined that the revised counterproposal made no substantial changes to the original counterproposal, but merely corrected typographical errors and clarified Newport Broadcasting's earlier presentation. Thus, we shall accept the amended counterproposal.

[5] Petitioner responded with a "Motion for Extension of Reply Filing Date." We find that such a request is not necessary in view of action taken herein. Generally, the Commission's procedure for accepting counterproposals provide interested parties an opportunity to address the proposals by a new cut-off date. The date to respond to a counterproposal is established by either the Public Notice announcing acceptance of the counterproposal or as, here, a Further Notice of Proposed Rule Making.

[6] MSB's reply comments consisted of its counterproposal previously advanced as an attachment to the petitioner's comments. Therefore, we consider the reply comments as a statement of continuing interest in pursuing the counterproposal to upgrade Station KDEZ(FM) at Jonesboro from Channel 261A to Channel 263C1.

[7] The restricted site coordinates for Channel 244C2 at Newport are 35-29-00 and 91-22-30.

[8] The allotment of Channel 247A at DeWitt can be accomplished at the existing site of Station KDEW-FM. The coordinates are 34-16-09 and 91-21-02.

[9] The restricted site coordinates are 35-25-52 and 92-01-54.

[10] The restricted site coordinates are 36-02-40 and 89-26-46.

[11] The coordinates are 35-51-17 and 90-43-40 (Jonesboro); 36-02-24 and 90-59-11 (Hoxie); and 35-36-38 and 91-15-02 (Newport).

[12] 47 CFR 1.420 (1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-125

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments, RM-6738
FM Broadcast Stations.
(Red Lodge, Montana)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 22, 1989; Released: June 12, 1989

By the Chief, Allocations Branch:

1. Before the Commission is a petition for rule making filed by Beartooth Stereo FM (petitioner) requesting the substitution of FM Channel 257C for Channel 258C1 at Red Lodge, Montana.[1] Petitioner also requests modification of its license for Station KAFM, Channel 258C1, to specify Channel 257C.

2. We believe petitioner's proposal warrants consideration. Channel 257C can be allotted to Red Lodge, Montana, in compliance with the minimum distance separation requirements of the Commission's Rules at the petitioner's site as specified in it's engineering analysis.[2] We shall also propose to modify the license of Station KAFM, Channel 258C1, to specify operation on Channel 257C in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to provide a wide coverage area Station for the Red Lodge, Montana area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Red Lodge, Montana	258C1	257C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 3, 1989,** and reply comments on or before **August 18, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

C. R. Crisler
Beartooth Stereo FM
Box 664
Fayetteville, Arkansas 72702

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Station KAFM's license for Channel 257A was modified in MM Docket No. 87-522, effective January 9, 1989, to specify operation on Channel 258C2. *See,* 3 FCC Rcd 6816 (1988).

[2] The coordinates for Channel 257C are 45-11-36 and 109-19-53.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-126

In the Matter of

Amendment of Section 73.202(b), RM-6669
Table of Allotments,
FM Broadcast Stations.
(Miramar Beach, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 22, 1989; Released: June 12, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Carol Renee Carter (petitioner) seeking the allotment of Channel 292A to Miramar Beach, Florida, as that community's first local FM service. Petitioner stated her intention to apply for the channel if allotted.

2. Petitioner states that Miramar Beach is a community with a population of 800 people located in the southern part of Walton County. Petitioner notes that the University of Florida estimates that Miramar Beach may have a population of 5,000 by the year 2000. Petitioner also states that Miramar Beach has several strip shopping centers and service facilities, including its own U.S. post office and town hall.

3. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission fairly, equitably and efficiently distribute frequencies " . . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to satisfy its status. Miramar Beach is not listed in the U.S. Census or incorporated.[1] Although petitioner points out that Miramar Beach has its own U.S. post and service facilities, we request any additional information demonstrating that Miramar Beach has social, economic, governmental or cultural indicia to qualify it as a "community" for allotment purposes. *See Ansley, Alabama*, 46 FR 58688 (1981); *Cascade Village, Colorado*, 48 FR 19917 (1983); *Ellwood, California*, 50 FR 13031 (1985).

4. A staff engineering analysis has determined that Channel 292A can be allotted to Miramar Beach, Florida in compliance with the minimum distance separation requirements with a site restriction of 2.4 kilometers (1.5 miles) east[2] to avoid short spacing to a construction permit for Station WILN(FM), Channel 290C2 at Panama City, Florida (BPH880407IA).

5. In view of the fact that Miramar Beach could receive it first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

City	Channel No. Present	Proposed
Miramar Beach, Florida	–	292A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **August 3, 1989,** and reply comments on or before **August 18, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

David A. Gross
Sutherland, Asbill & Brennan
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2404
(Attorney for Petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] We note that Miramar Beach is listed in the 1988 Edition of the Rand McNally Commercial Atlas, with a population of 950 persons. However, mere geographical location is not sufficient to establish "community" status. *See, Vimville, Mississippi,* 48 FR 5974 (1983).

[2] The coordinates for this allotment are North Latitude 30-22-30 and West Longitude 86-20-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-127

In the Matter of

Amendment of Section 73.202(b), RM-6673
Table of Allotments,
FM Broadcast Stations.
(Hilo, Hawaii)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 22, 1989; **Released: June 12, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Phillip Lee Brewer (petitioner) requesting the substitution of Channel 250C1 for Channel 250C2 at Hilo, Hawaii, and modification of its license for Station KKBG-FM to specify operation on the higher class co-channel. Petitioner states it will file an application for the new channel, if allotted.

2. Channel 250C1 can be allotted to Hilo in compliance with the Commission's minimum distance separation requirements and can be used at Station KKBG-FM's present transmitter site.[1] As requested, we shall also propose to modify petitioner's license for Station KKBG to specify operation on Channel 250C1 in lieu of Channel 250C2. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of Channel 250C1 at Hilo, Hawaii, or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such interested parties.

3. We believe the public interest would be served by proposing the substitution of Channel 250C1 for Channel 250C2 at Hilo, Hawaii, since it could enable Station KKBG to expand its coverage area. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Hilo, Hawaii	250C2	250C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 3, 1989,** and reply comments on or before **August 18, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Roger J. Metzler
McQuaid, Bedford, Brayton,
Clausen & Metzler
650 California Street, Suite 800
San Francisco, California 94108
(Attorney for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 19-44-11 and West Longitude 155-01-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-128

In the Matter of

Amendment of Section 73.202(b), RM-6655
Table of Allotments,
FM Broadcast Stations.
(Marlin, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 22, 1989; Released: June 12, 1989

By the Chief, Allocations Branch:

1. At the request of KRZI, Inc. (petitioner)[1], the Commission considers herein a petition for rule making requesting the substitution of Channel 225C2 for Channel 225A at Marlin, Texas, and the modification of its license for Station KRXX(FM) to specify operation on the higher powered channel. Petitioner submitted information in support of its proposal and states if permitted it will promptly implement the expanded service.

2. Channel 225C2 can be substituted for Channel 225A at Marlin in compliance with the Commission's minimum separation requirements at the site specified by the petitioner, which is 26.8 kilometers (16.7 miles) west of the city.[2]

3. As requested, we shall propose to modify the license for Channel 225C2 at Marlin, Texas, to specify operation on Channel 225A. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Marlin.

4. In view of the fact that Marlin, Texas, could receive its first wide coverage area FM service, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Marlin, Texas	225A	225C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 3, 1989,** and reply comments on or before **August 18, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Laura B. Humphries,
Esquire
Leventhal, Senter & Lerman
Suite 600
2000 K Street, N.W.
Washington, D. C. 20006-1809
(Counsel for petitioner)

Mr. Van D. Goodall
KRZI, Inc.
1018 N. Valley Mills Dr.
Waco, TX 76710
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Formerly Crowder Broadcasting Corporation.

[2] The coordinates are 31-22-48 and 97-09-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-132

In the Matter of

Amendment of Section 73.202(b), RM-6705
Table of Allotments,
FM Broadcast Stations.
(Whitewater, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 23, 1989; Released: June 12, 1989

By the Chief, Allocations Branch:

1. The Commission has under consideration a petition for rule making filed by Caribbean Broadcasting Corporation (petitioner), proposing the allotment of Channel 293A to Whitewater, Wisconsin, as that community's second local FM service. Petitioner submitted information in support of its proposal and expressed an interest in applying for the channel, if allotted.

2. Our engineering analysis reveals Channel 293A can be allotted to Whitewater consistent with the Commission's minimum separation requirements with a site restriction. A site restriction 7.4 kilometers (4.6 miles) north of the city is required in order to protect Station WTWV(FM), Channel 294B at Des Plaines, Illinois.[1]

3. In view of the fact that Whitewater, Wisconsin, could receive a second FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Whitewater, Wisconsin	283A	283A, 293A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 3, 1989,** and reply comments on or before **August 18, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Marvin Rosenberg, Esquire
Frank R. Jazzo, Esquire
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in

initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The restricted site coordinates are 44-54-02 and 88-44-01.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 83-523

In the Matter of

Amendment of Part 74 of the Commission's Rules and Regulations In Regard to the Instructional Television Fixed Service

THIRD REPORT AND ORDER

Adopted: May 31, 1989; Released: June 13, 1989

By the Commission:

1. On January 5, 1988, the U. S. Court of Appeals, D.C. Circuit, remanded to the Commission for further consideration two aspects of the rules governing the Instructional Television Fixed Service ("ITFS").[1] *Telecommunications Research and Action Center v. Federal Communications Commission* (" *TRAC v. FCC* "), 836 F.2d 1349 (D.C. Cir. 1988). Those rules were established in *Second Report and Order* in MM Docket No. 83-523 (" *ITFS Order* "), 101 FCC2d 49 (1985); *Memorandum Opinion and Order* in MM Docket No. 83-523 (" *ITFS Reconsideration Order* "), 59 RR2d 1355 (1986); *aff'd*, 1 FCC Rcd 24 (1986). The issue under consideration here[2] results from the court's rejection of the Commission's decision to break ties in its comparative selection procedure (for choosing among mutually exclusive ITFS applicants) by using a lottery without the minority and diversity preferences of the Communications Amendments Act of 1982 (Lottery Statute).[3] In response to the court's decision, the Commission proposed the adoption of additional rules in *Order and Second Further Notice of Proposed Rule Making* in MM Docket No. 83-523 (" *Second ITFS Notice* "), 3 FCC Rcd 4564 (1988).

BACKGROUND

2. In 1983, after an initial underutilization of the ITFS allocation, the Commission decided to permit non-ITFS use of an ITFS system's "excess capacity."[4] This significantly increased the demand for ITFS facilities, and the Commission was confronted for the first time with mutually exclusive competing applications. To resolve such cases, the Commission adopted a comparative selection procedure for ITFS in *ITFS Order*, *supra*. By this procedure, the Commission comparatively judges applicants for mutually exclusive facilities based on specified criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Id.* at 65-72. The specific criteria were ranked in order of importance and assigned numerical values.[5] The applicant with the highest point accumulation is granted the license. For cases in which the most qualified applicants are not distinguished by these criteria, the Commission intended to select among them by random-selection lottery, with each of the tied parties enjoying an equal chance of winning. *Id.* The court rejected this tie-breaker procedure, expressing its belief that in many cases the limited number of comparative criteria would lead to deadlocks resulting in tie-breaker lotteries, and that the ITFS selection procedure appeared to constitute a "system of random selection." *TRAC v. FCC*, *supra* at 1358. It concluded that the lottery aspect of such a system must include the preferences specified in the Lottery Statute. *Id.* at 1361.

3. The Commission's basic comparative selection procedure and the specific comparative criteria adopted for ITFS were not challenged or disturbed on appeal. As we stated in *Second ITFS Notice*, *supra* at 4565: "[O]ur . . . confidence in the ability of this selection system and its criteria to determine consistently and fairly the applicant most qualified to provide the most effective ITFS service remains unchanged." In response to the court's rejection of the Commission's tie-breaker process, however, we proposed a secondary comparative selection criterion for those cases in which the comparative criteria fail to distinguish among competing applicants. *Id.*

4. Specifically, we proposed that when comparative applicants are otherwise indistinguishable, the contested authorization would be awarded to the applicant that proposes to serve the greatest number of students. The Commission had previously rejected this sort of numerical standard for comparative evaluation, stating that quantity of use should not be stressed over quality of use. *ITFS Order*, *supra* at 71. However, as we stated in *Second ITFS Notice*, *supra* at 4565, the use of this criterion in the manner proposed, *i.e.*, as a secondary factor, would not be inconsistent with that concern, as it would stress quantity only if the predictors of "quality" of use fail to distinguish among the applicants. We also noted that when we had previously evaluated a similar criterion, we had not considered that such a comparative consideration could have the beneficial effect of encouraging applicants to extend the reach of their services to include additional schools and students. *Id.*

5. In proposing this tie-breaker criterion, the Commission acknowledged that there are a number of possible ways to apply it, and requested suggestions and comment on ways to devise and apply the criterion that would be practical, fair, and meaningful. It also sought comment on any other possible tie-breaker criterion, either in place of this criterion or as a tertiary tie-breaker if one were ever necessary.

COMMENTS

6. Comments were filed by Network for Instructional TV, Inc. ("NITV") and joint comments were filed by Arizona Board of Regents and others ("Arizona").[6] All commenters support the Commission's determination not to use a statutory lottery as a tie-breaker mechanism for comparative selections, arguing that a lottery results in an arbitrary choice among applicants where significant differences remain upon which they can be distinguished. Arizona also stresses its concurrence with the Commission's position that the minority and diversity preferences involved in a statutory lottery are not appropriate for selecting ITFS licensees. NITV suggests that the uncertainty injected by any lottery discourages negotiation among competing applicants and otherwise delays the initiation of ITFS services.

7. NITV urges the Commission to adopt its tentative proposal and break ties based on the number of students to be served by the respective applicants. It would consider total enrollment at each applicant's school(s) (or its members' school(s), in the case of a consortium) and any receive sites for which "letters of reasonable assurance"[7] had been submitted. It also suggests that the Commission construe "students" to include all "learners" intended to be served, including administrative and staff personnel, business and industry users, and continuing adult education students, at least as a factor to consider when the formal enrollment figures are not sufficiently different to justify award of an authorization to one applicant. It suggests that the appropriate time for determining the number of students is as of the last date for filing petitions to deny, or thirty days thereafter.

8. Arizona contends that the meaningful differences which remain among competing applicants which are not distinguished by the primary comparative criteria are those related to the applicants' relative abilities to provide ITFS service. It argues that a quantitative criterion would be difficult to apply and subject to abuse, and that the more directly relevant a quantitative criterion is (*e.g.*, actual student/classroom hours), the more difficult will be the burdens of analysis and proof. It continues that a simple rule of total enrollment would constitute a capricious and arbitrary abdication of the public interest standard of Section 309 of the Act. On the other hand, it argues, the likelihood that the applicants can effectuate their proposals can be evaluated by examining existing, local instructional telecommunications staff and production capabilities, and the applicants' prior instructional television experience. Because the comparison of competing claims will require individual evaluation, it contends that ties should be broken by this criterion only if there is enough of a distinction to amount to a substantial preference. It maintains that searching for minor distinctions in order to break a tie trivializes the selection process and results in unfairness to the loser. For those cases without a substantial difference on this basis, it concludes, the channel capacity should simply be evenly divided among the applicants.

9. NITV opposes Arizona's proposed criterion. It contests Arizona's implication that locally produced programming is inherently superior or more effective than material produced elsewhere, and notes that experience is considered of minor import in broadcast comparative hearings, as it confers only a temporary advantage and could discourage qualified newcomers. It concurs with Arizona that channels should be evenly divided in cases where the tie-breaker criterion fails to establish a significant difference between the competing applicants.

RESOLUTION

10. The secondary criterion we adopt herein is for use only after the primary criteria have failed to distinguish the qualifications of the competing applicants to provide ITFS service. In this light, we agree with the principle advanced in both comments submitted -- that we should not strain to find a difference, or make an award based on an insignificant difference, among otherwise equally qualified competing applicants.[8]

11. We are convinced, however, that a significant difference does remain in applicants' relative qualifications to provide ITFS service where there is a sizeable difference in the number of students who would benefit. We cannot ignore the fact that where two applicants are otherwise equally qualified to provide effective ITFS service, the party which is able to provide ITFS service to the greater number of students can further extend the educational benefits for which this spectrum has been dedicated, and that a well-qualified entity which can serve more students will thus generally make greater use of contested facilities than a similarly qualified entity which can serve fewer students. At the same time, we recognize that potential may not always be fully realized, and the amount of actual use, in terms of the number of hours of individual students' use and the extent of integration into curricula, will not necessarily be directly proportional to the number of students within reach of ITFS facilities. However, the likelihood of greater usage increases with the size of the student populations, and the likelihood that one applicant will make greater use than another similarly increases with the size of the difference in their student populations. We also acknowledge that student population is subject to change over time; but where there are sizeable differences, it can be assumed that a meaningful difference will persist for some time. Consequently, where there is a significant difference in the number of students which can receive the respective proposed ITFS services, that criterion will be used to award a license among competing ITFS applicants which are otherwise equally qualified.[9] Accordingly, for those cases in which two or more competing ITFS applicants remain tied under the primary comparative process, if any applicant's system would reach less than 80% as many students as the system of the applicant with the most students, any such application will be denied. If more than one applicant remains, the channel capacity will be evenly divided among the equally qualified applicants.

12. This tie-breaker criterion will not encompass unenrolled learners or persons enrolled solely in continuing education, in-service training for teachers, and the like. While continuing education, in-service training, and other less formal informational uses are valuable ITFS services, they are not the principal uses for which ITFS is intended and therefore do not carry sufficient weight to be considered in a comparative tie-breaker.[10] Where there is not a sufficient difference in the respective student populations to be provided with ITFS service by equally highly qualified competing applicants to merit awarding ITFS facilities to one of them, neither one should be granted an authorization for the benefit of its nonformal uses at the expense of the other's opportunity to serve its formally enrolled students. In this determination we continue to follow our "clear and guiding principle . . . that the primary purpose of ITFS was at its founding and remains to serve formal academic needs." *ITFS Order*, *supra* at 80; *see also id.* at 80-82; *ITFS Reconsideration Order*, *supra* at 1377. Additionally, it would be extremely difficult, perhaps impossible in some cases, to count and verify the number of such users who are not formally enrolled. For the same reasons, we will not look to such uses and students as an "enhancement" factor for close cases, as suggested by NITV.

13. Accordingly, in cases in which applicants for mutually exclusive facilities are tied under the primary selection criteria, we will consider the number of students at each of the applicant's specified receive locations who are formally enrolled in courses for credit towards an academic degree or diploma, or a legally required certifica-

tion or license. Applicants will be permitted to count all students enrolled at all campuses or schools (or other locations used to serve enrolled students) which have receive sites listed as of the final date for counting enrollment. (*See* para. 16 and n. 14, *infra.*)[11] Consideration was given to counting all students enrolled by an applicant, regardless of specific receive site locations listed. However, while this approach would measure the greatest ultimate potential of an applicant, it is too speculative a ground upon which to base a comparative award. Actual receive locations listed more accurately reflect that extent of an applicant's plans which are firm enough to be considered in measuring the potential upon which a comparative award will be based. There will be no distinction between full- and part-time students. To make such a distinction would seriously complicate matters of proof, yet would not sufficiently add to the utility of the criterion to justify such a distinction. The applicants' claims must also be demonstrated to be consistent with the educational programming proposed in their applications.

14. We have considered attempting a narrower or more precise formulation for the measuring tool to be used in applying this criterion. However, we agree with Arizona that attempts to measure actual proposed use, *e.g.*, in terms of minutes of programming per student, or students per individual class, would increase in complexity in direct relation to the degree of accuracy pursued. Moreover, it is unnecessary to use a tie-breaker criterion that measures actual use in this manner. We may presume that any applicant which is sufficiently qualified to reach a tie-breaker for contested facilities will make the best educational use, in its judgment, of its facilities. The fact remains that the more students an applicant demonstrably can serve, the more students can benefit from ITFS service, and the greater the difference in the number of students enrolled, the greater the difference in likely overall usage. Thus, in our judgment, it is more appropriate for a tie-breaker to compare the sizes of the student populations at the applicants' respective receive locations than variations in the precise details of immediate short-term proposals.[12] At the same time, we recognize that in some situations, counting all enrolled students at a particular campus or other receive site would not accurately reflect the service goals of a particular proposal. While we do not intend to require justification for each individual student claimed by an applicant for its proposed service, in cases where an applicant clearly would use its service for a specific and limited segment of its student population, that smaller number representing only those students will be used in lieu of total enrollment. Such determinations will be made as necessary, based on the applicant's statement of purpose, proposed programming schedule, receive site location(s) on campus, extent and nature of receive site equipment and facilities, and any other probative information available. [13]

15. Enrollment figures must be taken from a statement or submission of data made by the subject school for some other official purpose or function, such as a mid-year or year-end fiscal report or a budget proposal, and must represent actual, not projected, student population.[14] The figures should be the most recent figures compiled for a regular school term or session prior to the final date for the filing of competing applications. (*See* 47 C.F.R. §74.911(c).) For applications on file as of the effective date of this Order, the "final date" for purposes of applying the enrollment tie-breaker will be August 22, 1989. Similarly, a receive location must have its antenna site on file as of that date in order to count students attending classes at that location. All applicants will be permitted to amend their applications to specify additional receive sites during this period,[15] affording a more meaningful comparison of applicants and their plans.

16. Applicants will not be required to submit their student enrollments and the extent of their proposed ITFS systems unless and until it is determined that they are tied in a comparative selection proceeding. Parties will then be notified of their tied status and given a specified period of time within which to advise the Commission that they are negotiating a settlement (*e.g.*, division of the channel capacity or reconfiguration of the proposed facilities at issue), or to submit enrollment information. Additional time within which to comment on the opposing party's service claims and enrollment submission will also be provided.[16] In the event the enrollment difference is insufficient to establish a winner, the parties will then be given an opportunity to request or suggest a specific division of channels or channel capacity. If no voluntary agreement is reached, the channel capacity will be evenly assigned by the Commission.

17. Arizona's proposal, that ties among competing applicants be resolved based on the applicants' experience and existing facilities and staff, is rejected for reasons in addition to those stated in paragraph 15, above. Any initial advantage in staff, experience, and facilities is likely to be narrowed to decisional insignificance, if not completely eliminated, in a relatively short period of time. Additionally, it would be inapt to penalize, rather that encourage, new ITFS operators. Finally and significantly, Arizona's criterion would be overly subjective, as well as extremely difficult and costly to apply.

PROCEDURAL MATTERS

18. *Regulatory Flexibility Act Analysis.* Pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980 (5 U.S.C. §605(b)), it is hereby certified that the rules adopted herein will not have a significant economic impact on a substantial number of small entities. The only impact will be the infrequent requirement of the submission of additional data from some applicants, and in virtually all such cases, the data will have been already compiled for other purposes.

19. *Paperwork Reduction Act Analysis.* The rule contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 (44 U.S.C. §§3501 - 3520) and found to impose a new information requirement on the public. Implementation of this new requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

20. Accordingly, IT IS ORDERED, That Part 74 of the Commission's Rules and Regulations IS AMENDED as set forth in the Appendix below, effective upon approval by the Office of Management and Budget, and in no case less than thirty days after publication of a summary of this Order in the Federal Register, pursuant to 5 U.S.C. §553(d)(1), under authority contained in 47 U.S.C. §§152, 154(i), and 303.

21. IT IS FURTHER ORDERED, That the Office of the Managing Director SHALL SEND to the Chief Counsel for Advocacy of the Small Business Administration the certification that the rules adopted will have no significant impact on a substantial number of small entities.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 74 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 74 continues to read as follows:

AUTHORITY: 47 CFR Secs. 4, 303 48 Stat. 1066, as amended, 1082, as amended, 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply Secs. 301, 303, 307, 48 Stat. 1081, 1082, as amended, 1083, as amended; 47 U.S.C. 301, 303, 307.

2. Section 74.913 is amended by revising paragraph (d) as follows:

§74.913 Selection procedure for mutually exclusive ITFS applications.

* * * * *

(d) The tie-breaker will operate as follows: each of the tied applicants will be directed to submit to the Commission a statement of the number of students at its proposed receive locations who are formally enrolled in classes for credit towards an academic degree or diploma, or a legally required certification or license. It must also demonstrate that this claim of students who would benefit from the proposed system is supported by the educational programs proposed in its application. Each applicant will serve its submission(s) on the other tied competing applicant(s), who will have an opportunity to respond to any aspect of the enrollment submissions. If any applicant's system would reach less than 80% as many students as another applicant's would reach, the application which would result in service to the fewer number of students will be denied. The application(s) of any remaining applicant(s) will be granted. If more than one application is to be granted under this procedure, the channels or channel capacity will be divided evenly among the remaining applicants. At any time during this process, the applicants may advise the Commission that they are negotiating or have reached settlement for disposition of the contested facilities, and the Commission will withhold further comparative processing upon such notification.

(1) Enrollment will be considered as of the final date for filing of the competing applications at issue. Enrollment figures should be the latest available from a regular term or session prior to that filing date, and must be taken from a statement or submission of data made by the subject school for some other official purpose or function, such as a mid-year or year-end fiscal report, or a budget proposal, and they must represent actual, not projected, student population. Each applicant must identify the source(s) from which its submitted enrollment figures are drawn.

(2) All full- and part-time students formally enrolled in classes for credit towards an academic degree or diploma, or a legally required certification or license, at any school, campus, or other locations listed in the application as a receive site may be counted, except if an applicant's system would serve only students in a particular discipline (or disciplines) or at a particular grade level (or levels), only students in classes and programs within that discipline(s) or grade level(s) may be counted.

(3) For off-campus sites, only students who can be shown to be recipients of formal ITFS educational material may be counted.

(4) Applicants serving students other than their own can count only students at schools, campuses, and other receive sites which have submitted a letter indicating their intention to use the proposed service. The validity of such expressions of intention will be judged pursuant to §74.932 of these rules. If several schools from the same school system are listed as receive sites, a single letter from an appropriate person representing the school board or system will be sufficient to demonstrate the intention to use the proposed service at each of these receive sites if each receive site's participation is specifically acknowledged.

* * * * *

Note 4. For applications pending as of the effective date of this Order, the enrollment which will be counted will be the most recent available up to August 22, 1989, for which receive sites are on file by that date.

FOOTNOTES

[1] ITFS stations are intended to be used primarily for the transmission of instructional and cultural material to specified receive sites for the formal education of students enrolled in accredited schools. On a secondary basis, other informational and cultural uses are permitted. In addition, ITFS operators are permitted to use or lease for use their "excess capacity" (unused transmission time, typically available during evening and weekend hours) for non-ITFS purposes. 47 C.F.R. §74.931.

[2] The other issue remanded was the Commission's decision not to predetermine a regulatory classification for nonsubscription service offered on ITFS excess capacity. *TRAC v. FCC*, *supra* at 1356. That issue has been resolved by the Commission's determination to require notification and specific approval prior to any such usage of excess capacity. *Order and Second Further Notice of Proposed Rule Making* in MM Docket No. 83-523 (" *Second ITFS Notice* "), 3 FCC Rcd 4564 (1988).

[3] Public Law 97-259, 96 Stat. 1087, Sept. 13, 1982 (47 U.S.C. §309(i)).

[4] 47 C.F.R. §74.931(e); *Report and Order* in General Docket No. 80-112, 94 FCC2d 1203 (1983).

[5] Applicants are awarded points if they are local (4), accredited (3), in compliance with the four channel limitation (2), vacating E or F channels (1), and based on the amount of ITFS programming they are proposing to provide (1 or 2). 47 C.F.R. §74.913.

[6] Joint Commenters are: Arizona Board of Regents; Arkansas Educational Television Commission; Board of Governors of State Colleges and Universities; Board of Trustees of the University of Cincinnati; Chicago (Illinois) City Colleges; Hawkeye Institute of Technology; Iowa Public Broadcasting Board; Nebraska Educational Telecommunications Commission; Regents of the University of Minnesota; Regents of the University of New Mexico and Board of Education of the City of Albuquerque, New Mexico; South Carolina Educational and Public Television Commission; State of Wisconsin - Educational Communications Board; University of Maine System; and University of Nebraska.

[7] To establish their eligibility, ITFS applicants which are not schools or educational entities serving their own enrolled students are required to submit letters from accredited schools to demonstrate that such schools will receive and use the applicant's formal educational programming. 47 C.F.R. §74.932(a)(4) and note 2.

[8] We also point out that we have always encouraged settlement among competing applicants by negotiated division of channel capacity or reconfiguration of facilities, and we continue to do so. This is no more true than when two or more equally highly qualified applicants are involved. Consequently, opportunity for competing applicants to divide contested facilities (or modify their proposals to make them compatible) will be provided throughout this procedure.

[9] As we noted in the *Second Further Notice*, *supra* at 4565, an enrollment criterion should have the additional beneficial effect of encouraging prospective applicants to extend the reach of their services to include as many schools and students as is consistent with their educational goals.

[10] Informal instructional use is already recognized to the limited extent appropriate, as compared to other factors, in the primary selection process --proposed informational and other nonacademic programming is considered in determining the number of points to award to each applicant for its proposed use of the facilities. 47 C.F.R. §74.913(b)(4).

[11] For applicants serving students other than their own, the validity of an individual receive site's intention to participate in the proposed ITFS service will be examined when the application is processed, to determine if its students should be counted. The guidelines for judging the adequacy of receive sites' expressions of intention, contained in notes 2 and 3 of §74.932 of the Commission's rules, will be followed. If several schools from the same school system are listed as receive sites, a single letter from an appropriate person representing the school board or system is sufficient if each receive site's participation is specifically acknowledged. The same will be true for any other campuses or alternative receive sites under a common authority. A consortium of schools will be considered to be serving the students of any of its individual members at any of the members' schools or campuses listed as receive sites.

[12] An applicant's programming proposal is already counted in the primary selection process, when points are awarded for "effective utilization of the ITFS spectrum." *ITFS Order*, *supra* at 710, 47 C.F.R. §74.913(b)(4). While this helps to ensure the greatest utilization of channels, to consider an applicant's programming proposal again, albeit in a slightly different manner, would accord it undue comparative weight. We also note that such a measure of actual proposed use would seriously complicate matters of proof and add considerable expense for applicants and the Commission.

[13] For instance, if a university applies for facilities in order to serve students in a particular discipline, such as medicine and engineering, only students enrolled within that discipline will be counted. Similarly, if a school district intends to concentrate its service in certain grade levels, *e.g.*, high school students but not elementary level students, only students at those grade levels can be counted. Some educational institutions and organizations use ITFS to reach students at off-campus sites, such as business buildings, medical centers, or public libraries. In such cases, only the enrolled students who can be demonstrated to be receiving formal instruction at those sites will be counted. We recognize that the number of students who could be served in this manner may not be demonstrable at the time of submitting an ITFS application. However, where the number of students who could benefit from the proposed service cannot be demonstrated with a degree of certainty, there is not sufficient grounds upon which to base a comparative award if a competing applicant can demonstrate a more certain student population.

[14] If no such document exists, the applicant must request a waiver of this requirement and submit the most reliable recent information available, identifying the nature and source of such information.

[15] Of course, receive sites which create new instances of mutual exclusivity cannot be added.

[16] Further guidance may be issued as cases arise, and every attempt will be made to establish facts regarding enrollments and students to be reached by paper pleadings without an oral hearing. However, a hearing will be set for the limited purpose of establishing facts related to enrollment, if necessary. At any time during this process the parties may, of course, negotiate a settlement for the contested facilities, and the comparative selection process will be suspended, upon joint request, to accommodate any such negotiations.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-389

In the Matter of

Amendment of Section 73.202(b), RM-6366
Table of Allotments,
FM Broadcast Stations.
(Bozeman, Montana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 22, 1989; Released: June 13, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 5011 (1988), issued in response to a petition filed by Eastern Montana College (petitioner), requesting the allotment of FM Channel *271C2 to Bozeman, Montana, and its reservation for noncommercial educational use. Petitioner filed comments in support of the *Notice* and restated its intention to apply for the channel. Petitioner also filed the TV Channel 6 study requested in the *Notice*. Big M Broadcast Associates, Inc. (Big M) filed comments. No other comments were received.

2. Big M initially opposed the allotment at Bozeman but after reviewing the petition now believes grant of the proposal would benefit the public. According to Big M, KTVM-TV, Channel 6, Butte, Montana, has experienced increased interference in the Bozeman area from local FM Stations in the reserved portion of the FM Band. Big M further asserts that, in an effort to expand its coverage area, petitioner has installed a system of FM translators in and around Bozeman which has created a clutter situation on the non-commercial portion of the FM band in the area, adding to the problems associated with TV Channel 6 interference. Big M states that the above situation could be eliminated with the allotment of Channel *271C2 at Bozeman, because the area would then be served by a single high power FM station rather than a cluster of translators. Big M believes that if petitioner submits an application for a construction permit for Channel *271C2, it should indicate to the Commission that the proposed station will be capable of originating some local programming and that the station will not be a fulltime satellite of Station KEMC-FM, Billings, Montana.

3. Petitioner states it has been attempting to upgrade service to the Bozeman area since 1985, and currently provides marginal National Public Radio programming via a translator station for Station KEMC, Billings, Montana. According to petitioner, Eagle Communications, licensee of Station KTVM-TV, Channel 6, Butte, Montana, will oppose any application for upgrade of service on the educational band in the Bozeman area because of interference to the channel six viewers in the Bozeman area. Petitioner provided a TV Channel 6 study supporting its request to reserve a noncommercial channel for educational use.

4. Channel *271C2 can be allotted to Bozeman in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] As stated in the *Notice*, the Commission does not normally reserve commercial channels for noncommercial educational use. However, exceptions have been made in cases where the channels in the noncommercial educational band are not available because of foreign allotments (Canadian or Mexican) or potential interference to operation on VHF Channel 6. Here, our engineering analysis confirms that Station KTVM-TV, Channel 6, Butte, Montana, effectively precludes any Class C2 operation on a noncommercial channel, while at the same time a number of channels are available in the non-reserved band. The reservation of a commercial channel for noncommercial educational use is, therefore, justified. In response to concerns about the type of programming intended by the petitioner, we do not believe it is appropriate in the rule making process to question the programming intentions of the party seeking an allotment.

5. We believe the public interest would be served by allotting Channel *271C2 to Bozeman, since an interest has been expressed in providing the community with its first noncommercial educational service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 28, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Bozeman, Montana	229C1, 236C1, *271C2

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel *271C2 are 45-40-54 and 111-02-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-131

In the Matter of

Amendment of Section 73.202(b),	RM-5849
Table of Allotments,	RM-5949
FM Broadcast Stations.	
(Mason City and Iowa City, Iowa)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 22, 1989; Released: June 13, 1989

By the Chief, Allocations Branch:

1. By *Notice of Proposed Rule Making*, 3 FCC Rcd 2002 (1988), the Commission proposed two contingent allotment changes at Mason City and Iowa City, Iowa. At the request of KRNA, Inc. ("KRNA"), we proposed the substitution of Channel 231C1 for Channel 230C1 at Iowa City, Iowa, and the modification of its license for Station KRNA(FM) to specify the adjacent channel, with a site restriction of 7.4 kilometers (4.6 miles) southeast. At the request of B-Y Communications, Inc. ("B-Y"), the *Notice* proposed the substitution of Channel 230C1 for Channel 228A at Mason City, Iowa, and the modification of its license for Station KNIQ to specify the higher powered channel, at its present transmitter site. The Mason City request is contingent upon Station KRNA(FM) being modified to specify operation on Channel 231C1 since the two communities are separated by less than the required 245 kilometers for co-channel Class C1 allotments. B-Y, KRNA and Prairie Broadcasting Company ("Prairie"), licensee of Station WPRE-FM, Prairie du Chien, Wisconsin, filed comments. Prairie filed reply comments.[1]

2. B-Y and KRNA each support the proposed changes at Mason City and Iowa City and reiterate their intention to apply for the proposed allotments. KRNA goes on to state that the *Notice* erroneously imposed the same 7.4 kilometer southwest site restriction on Channel 231C1 at Iowa City as would have been necessary if B-Y had continued to request Channel 231C2 at Mason City. Since B-Y did amend its proposal to instead request Channel 230C1, KRNA states that the Commission should have proposed the allotment of Channel 231C1 at Iowa City without a site restriction. However, based on the incorrect site restriction, it points out that the Commission subsequently released a *Notice of Proposed Rule Making* in MM Docket 88-186 proposing the substitution of Channel 232C2 for Channel 232A at Prairie du Chien, Wisconsin, for Station WPRE-FM, with a site restriction of only 0.6 kilometers (0.4 miles) southwest. If the Commission were to adopt the Prairie du Chien proposal, it would have to impose an unacceptable 0.9 kilometer south site restriction on Channel 231C2 at Mason City, according to KRNA. KRNA submits that it sought the substitution of channels at Iowa City so that it could relocate the station's transmitter to the north of the community. It claims that it has identified an area approximately ten miles north of Iowa City which would allow the station to maximize its coverage of the surrounding area. Relocating south of Iowa City, according to KRNA, is unacceptable. It states that the existence of the local airport south of Iowa City will severely restrict the choice of potential sites and that the terrain to the south is generally lower and therefore an inferior choice for radio transmission facilities. However, permitting use of Channel 231C2 to the north of Iowa City would allow Station KRNA to improve its coverage area, thus allowing reception by a substantially greater number of listeners. Further, KRNA states that its tentative site is close to an existing broadcast tower and thus it does not anticipate any difficulty in complying with local zoning ordinances or FAA regulations.

3. WPRE objects to the allotment of Channel 231C1 to Iowa City unless the 0.9 kilometer south site restriction is imposed to avoid a short-spacing to the proposed allotment of Channel 232C2 at Prairie du Chien. It contends that Channel 231C1 should not be allotted without a site restriction based only on an unsupported claim of a shortage of available transmitter sites to the south.

4. In its late-filed comments, KRNA submits new coordinates for Channel 231C2 at Iowa City. According to KRNA, use of the new transmitter site will eliminate the present short-spacing between its Iowa City proposal and both the proposed Channel 232C2 allotment at Prairie du Chien and the transmitter site specified by Joyner for Station WMLW-FM in its pending modification application (BPH-880801IE). By resolving these conflicts, KRNA states that the affected stations will be able to more rapidly provide improved service to the areas surrounding Iowa City and Mason City, Iowa, and Prairie du Chien and Watertown, Wisconsin.

5. We have confirmed that Channel 231C1 can be allotted to Iowa City at the new transmitter site proposed by KRNA and that use of this site will also permit the allotment of Channel 230C1 to Mason City at the present transmitter site of Station KNIQ. Additionally, use of the new transmitter site will negate the conflict with the allotment of Channel 232C2 at Prairie du Chien, as proposed in MM Docket 88-186, and the application of Joyner to relocate the transmitter of Station WMLW-FM at Watertown, Wisconsin.

6. Therefore, based on the above information, we believe that the public interest would be served by substituting Channel 231C1 for Channel 230C1 at Iowa City, Iowa, and substituting Channel 230C1 for Channel 228A at Mason City, Iowa. Channel 231C1 can be allotted to Iowa City in compliance with the Commission's minimum distance separation requirements with a site restriction of 21.1 kilometers (13 miles) west to accommodate KRNA's desired transmitter site. Channel 230C1 can be allotted to Mason City, Iowa, in compliance with the Commission's minimum distance separation requirements and can be used at the Station KNIQ's present transmitter site.[2] As proposed, we shall also modify the licenses of Stations KRNA(FM) and KNIQ to specify operation on Channel 231C1 and 230C1, respectively.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 28, 1989,** the FM Table of

Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Iowa City, Iowa	231C1, 264C1
Mason City, Iowa	230C1, 242A, 291C1

8. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of KRNA, Inc. for Station KRNA(FM), Channel 230C1, Iowa City, Iowa, and the license of B-Y Communications, Inc. for Station KNIQ, Channel 228A, Mason City, Iowa, ARE MODIFIED to specify operation on Channels 231C1 and 230C1, respectively, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensees shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] KRNA and Joyner Communications, Inc. ("Joyner"), licensee of Station WMLW-FM, Watertown, Wisconsin, filed late comments. We have accepted KRNA's late-filed comments for consideration since they provide information permitting the resolution of this proceeding without denial of any of the acceptable proposals before us. We need not consider Joyner's comments since the action taken herein renders them moot.

[2] The coordinates for Channel 231C1 at Iowa City are North Latitude 41-42-12 and West Longitude 91-46-54. The coordinates for Channel 230C1 at Mason City are North Latitude 43-08-50 and West Longitude 93-14-39.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-124

In the Matter of

Amendment of Section 73.202(b), RM-6663
Table of Allotments,
FM Broadcast Stations.
(Madisonville, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 22, 1989; Released: June 13, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Major Broadcasting Corporation (petitioner), seeking the allotment of Channel 258A to Madisonville, Tennessee, as that community's first local FM service. Petitioner states its intention to apply for the channel, if allotted.

2. Channel 258A can be allotted to Madisonville in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.3 kilometers (3.3 miles) south of the city.[1] The restriction is necessary in order to avoid a short spacing to the present licensed transmitter site of Station WKDP-FM, Channel 258C2 at Corbin, Kentucky. We note that the required site restriction may be eliminated once Station WKDP-FM is licensed in accordance with its outstanding construction permit (BPH-881123IF).

3. In view of the fact that Madisonville, Tennessee, could receive its first local FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Madisonville, Tennessee	—	258A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 4, 1989,** and reply comments on or before **August 21, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Robert S. Stone, Esquire
McCampbell & Young
Suite 2021 Plaza Tower
P. O. Box 550
Knoxville, TN 37901-0550
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The restricted site coordinates are 35-28-23 and 84-22-14.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-129

In the Matter of

Amendment of Section 73.202(b), RM-6675
Table of Allotments,
FM Broadcast Stations.
(Lake Geneva, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 23, 1989; Released: June 13, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Southern Wisconsin Company, Inc. (petitioner), seeking the allotment of Channel 241A to Lake Geneva, Wisconsin, as that community's first local FM service. Petitioner expresses its intention to apply for the channel, if allotted.

2. Channel 241A can be allotted to Lake Geneva in compliance with the Commission's minimum distance separation requirements with a site restriction of 2 kilometers (1.2 miles) northwest of the city.[1] The site restriction is necessary in order to avoid short spacings to Station KLIO(FM), Channel 241C1 at Clinton, Iowa, and Station WBBM-FM, Channel 242B, Chicago, Illinois. In addition, since Lake Geneva is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government must be obtained for the proposal.

3. In view of the fact that Lake Geneva could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Lake Geneva, Wisconsin	---	241A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 4, 1989,** and reply comments on or before **August 21, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Donald E. Martin, Esquire
Spencer W. Weisbroth, Esquire
Donald E. Martin, P.C.
Suite 200
2000 L Street, N.W.
Washington, D. C. 20036
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The restricted site coordinates are 42-36-50 and 88-26-51.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-131

In the Matter of

Amendment of Section 73.202(b), RM-6702
Table of Allotments,
FM Broadcast Stations.
(Grand Coulee, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 23, 1989; Released: June 13, 1989

By the Chief, Allocations Branch:

1. At the request of Pioneer Broadcasting, Inc. (petitioner), licensee of Station KEYG-FM, Channel 253C2 at Grand Coulee, Washington, the Commission considers herein a petition for rule making proposing the substitution of Channel 253C for Channel 253C2 and modification of the station's license to specify operation on the higher class co-channel. Petitioner provided information in support of its proposal.

2. The substitution can be made consistent with the Commission's minimum separation requirements at the site specified by the petitioner.[1] Since Grand Coulee is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government must be obtained for the proposal.

3. As requested, we shall propose to modify petitioner's license for Channel 253C2 at Grand Coulee, Washington, to specify operation on Channel 253C. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Grand Coulee.

4. Accordingly, in order to provide the area surrounding Grand Coulee with additional wide coverage area FM service, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Grand Coulee, Washington	253C2	253C

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 4, 1989,** and reply comments on or before **August 21, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Barry A. Friedman, Esquire
Wilner & Scheiner
1200 New Hampshire Avenue, N.W.
Suite 300
Washington, D. C. 20036
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates specified by the petitioner are 47-52-48 and 118-58-20. We note that the petitioner's requested site is located 0.3 kilometer from the station's current transmitter site.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

APPALACHIAN EDUCATIONAL COMMUNICATION CORPORATION — File No. BLED-840817BZ

For License to Cover Construction
Permit for Station WHCB(FM),
Bristol, Tennessee

ORDER

Adopted: May 26, 1989; Released: June 13, 1989

By the Commission:

1. On October 15, 1984, RAM Communications, Inc. ("RAM") filed a petition to deny the subject application for license to cover construction permit for WHCB(FM), Bristol, Tennessee filed by Appalachian Educational Communications Corporation ("AECC"). The Chief, Audio Services Division, Mass Media Bureau, acting pursuant to authority delegated by 47 C.F.R. § 0.283, denied the petitioner's objections by letter dated December 23, 1986. Thereafter, on January 23, 1987, RAM filed an application for review in response to that staff action, which was subsequently denied by the Commission in *Appalachian Educational Communication Corporation*, 3 FCC Rcd 5136 (1988) (" *Order* "). That *Order*, however, did not grant the license application, which was subsequently granted by the Bureau under delegated authority on November 23, 1988. The Commission has before it now an application for review of that staff action filed by RAM on January 3, 1989.

2. The instant application for review restates arguments made by RAM in its January 23, 1987 application for review, which was denied in the *Order*. Inasmuch as RAM has failed to raise any matters not previously disposed of in the *Order*, we find no reason to disturb the Bureau's November 23, 1988 grant of the subject license application. Accordingly, IT IS ORDERED, That the application for review IS DENIED.

3. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, shall send by Certified Mail-Return Receipt Requested, a copy of this Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications
Tariff FCC No. 2

ORDER

Adopted: May 31, 1989; Released: June 2, 1989

By the Chief, Common Carrier Bureau:

1. On April 21, 1989, the Commission released an order requiring, among other things, that AT&T tariff its 800 directory assistance ("DA") service.[1] AT&T currently provides this service to other interexchange carriers ("IXCs") on a contractual basis. The Commission directed AT&T to file its 800 DA tariff by June 5, 1989. On May 25, 1989, AT&T filed a motion seeking a sixty-day extension of time in which to file its 800 DA tariff.

2. AT&T states that it seeks this extension because it currently lacks information on usage of its 800 DA service by the various IXCs. AT&T states that it has initiated a study to obtain this information so that it can establish 800 DA tariff rates that reflect demand and cost forecasts. AT&T states that it can complete this study and file a tariff based thereon by August 4, 1989. It also states that it has notified each IXC to which it currently provides 800 DA service of this request for extension of time.

3. Although it is the policy of the Commission that extensions of time shall not be routinely granted,[2] we believe that the public interest would be served by allowing AT&T time to complete its study on 800 DA usage so that the tariffed rates for this service reflect forecasted cost and demand factors. In the interim, AT&T shall continue to provide 800 DA service on a nondiscriminatory basis to other IXCs through contractual arrangements.

4. Accordingly, IT IS ORDERED, pursuant to Sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91 and 0.291, that the motion of AT&T for extension of time is GRANTED. AT&T should file its tariff for 800 DA service on or before **August 4, 1989.**

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Provision of Acess for 800 Service, Report and Order, CC Docket No. 86-10, RM-5101, FCC 89-106, released April 21, 1989.

[2] *See* Section 1.46(a) of the Commission's Rules, 47 CFR §1.46(a) (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Request of

MILLICOM INCORPORATED — No. MSD-89-3

For Declaratory Ruling Concerning
Section 310 (b)(4) of the
Communications Act of 1934

MEMORANDUM OPINION AND ORDER

Adopted: June 1, 1989; Released: June 6, 1989

By Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On February 16, 1989, Millicom Incorporated (Millicom), pursuant to Section 1.2 of the Rules, requested a declaratory ruling concerning its compliance with the alien ownership requirements of the Communications Act. The Commission issued a public notice requesting comments from interested parties on the Request. *See Request for Declaratory Ruling by Millicom, Inc.*, Public Notice No. 1773 (released February 24, 1989). No comments were received concerning Millicom's request.

2. In its petition Millicom requests a declaratory ruling that the interim structure -- and possible future structure -- of Millicom's board of directors is consistent with the public interest and Section 310 (b)(4) of the Communications Act.

II. BACKGROUND

A. Description of Millicom

3. Millicom is a publicly traded Delaware corporation, which is not itself a Commission licensee. However, a number of wholly-owned Millicom subsidiaries hold common carrier and private radio licenses. Millicom is also a major stockholder of North American Mobile Satellite, Inc., one of the eight applicants to construct and launch a mobile communications satellite system. In addition, Millicom owns a fifty percent interest in Millicom Digital Termination Services, Inc. which holds numerous authorizations for Digital Electronic Message Service. A Millicom subsidiary also owns a small minority interest in the wireline block cellular licensee for the Gulf of Mexico. Millicom is also involved in foreign communication enterprises; it owns the seventh largest cellular reseller in Great Britain. Additionally, Millicom subsidiaries are participants in joint ventures holding cellular telephone licenses in Hong Kong, the Philippines, Mauritius, Sri Lanka, and Costa Rica.

B. Pre - Existing Corporate Structure

4. Millicom's board of directors consisted of six members, five of whom are United States citizens. The sixth director, Jan Stenbeck, resides in the United States but is a Swedish citizen.[1] All other officers and directors of Millicom and its subsidiaries are United States citizens. Millicom asserts that there are no substantial foreign stockholders of Millicom.[2]

C. New Structure

5. Millicom states that after one of its directors (a United States citizen) resigned, the board of directors elected a key employee, Jeremy Metcalfe, a citizen of Great Britain, to fill the vacancy until the next annual stockholders' meeting. Millicom would like to propose at the next annual stockholders' meeting that Mr. Metcalfe be elected to a position on the board. His election would bring the number of foreign directors in Millicom's board of directors to two out of six, or 33 1/3%. Millicom requests that the Commission issue a declaratory ruling that Mr. Metcalfe's interim participation and election to Millicom's board of directors is consistent with the public interest and with the requirements of Section 310 (b)(4) of the Act.

6. In support of its request, Millicom states that Mr. Metcalfe brings to the board of directors a wealth of knowledge, experience and skill in telecommunications, international and foreign regulatory rules and policies, finance and marketing. His work in developing domestic United States private paging operations, Millicom states, has been exemplary and makes his input invaluable to development of Millicom's other telecommunications operations. In addition, Millicom argues that Metcalfe's experience in international cellular and paging will significantly enhance the development of Millicom's domestic radio common carrier and cellular endeavors, and thereby benefit United States subscribers. Furthermore, Millicom states, Mr. Metcalfe's addition to Millicom's board will assist in assuring the continuing vitality of Millicom's extensive foreign assets, which will in turn preserve both the United States-based jobs provided by Millicom's foreign activities and the value of Millicom to its overwhelmingly United States citizen stockholders.

7. In addition, Millicom points out, both foreign directors are citizens of countries friendly to the United States, as well as individuals with strong personal and business ties to this country. Mr. Stenbeck is a permanent United States resident, whose wife and children are United States citizens. Mr. Metcalfe intends to apply for permanent resident status and manages a large United States communications business (Metagram America Inc. which holds private radio paging licenses under Part 90 of the Commission's rules). Moreover, Millicom affirms that all officers of Millicom will continue to be United States citizens and that all Millicom subsidiaries holding United States common carrier licenses will continue to comply with Section 310 (b) of the Act. Finally, Millicom emphasizes that in excess of 90% of its outstanding stock will continue to be held by United States citizens.

III. DISCUSSION

8. Section 310 (b)(4) of the Communications Act of 1934, as amended, provides that common carrier radio licenses shall not be granted to or held by:

> any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, . . . if the Commission finds that the public interest will be served by the refusal or revocation of such license.

If a company installs an alien as an officer or director, the Commission may subsequently find that the public interest requires refusal or revocation of its licenses. For this reason, the Commission has in the past entertained requests for declaratory rulings prior to the election of aliens as officers or directors. *See International Telephone and Telegraph Corp.*, 67 F.C.C. 2d 604 (1978); *Warner Cable Corp.*, 48 F.C.C. 2d 267 (1974); *Tribune Co.*, 47 F.C.C. 2d 522 (1974); *Avco Broadcasting Corp.*, 23 F.C.C. 2d 659 (1970). Accordingly, we will issue a declaratory ruling in this case.

9. By its express language, the benchmarks established in Section 310 (b)(4) apply to entities such as Millicom which directly or indirectly control licensees. The statute permits aliens to hold 25% ownership or voting interests in such companies. This section does not proscribe aliens from becoming directors of such companies, as long as at least 75% of the directors are United States citizens. *See Wilner & Scheiner*, 103 FCC 2d 511, 516-17 (1985), 58 Rad. Reg. 2d (P&F) 531, 539-41, *recon. granted in part*, 1 FCC Rcd 12 (1986). *See also McCaw Cellular Communications Inc.*, DA 89-356 (Com. Car. Bur. April 4, 1989).

10. The statutory provisions of Section 310 (b) of the Communications Act address the participation of foreigners in the provision of certain types of radio services – that is, broadcast, common carrier, aeronautical en route or aeronautical fixed services. Section 310 (b) reflects the broad purpose of "safeguarding the United States from foreign influence" in the field of broadcasting, *Wilner & Scheiner*, 58 Rad. Reg. 2d (P&F) at 536, as well as in common carrier services. The specific citizenship requirements governing positional, ownership and voting interests reflect a deliberate judgment on the part of Congress as to the limitations necessary to prevent undue alien influence in broadcasting. *Id.* The alien ownership regulations reflect security precautions designed to prevent the participation of aliens in domestic radio activities. *Id.* at 536 n. 31. The provisions set forth in Section 310 concerning alien ownership restrictions reflect traditional national security concerns and have most frequently been addressed in the context of broadcast licenses. In cases where the alien ownership does not exceed the statutory benchmarks our analysis includes whether the foreigner or alien will exercise *de facto* control over the licensee and whether the ownership interests of the alien are within the limitations prescribed by Congress. *Id.* at 536 n. 33. In applying the alien ownership benchmarks contained in Section 310 (b)(3), the Commission has no authority to independently assess whether or not the grant of a license to a company in which an alien holds an ownership interest above 20% would result in undue influence or control. *Id.*

11. However, the restrictions on foreign participation in companies that own or control a Commission licensee are not absolute. The Commission has the discretion under Section 310 (b)(4) to refrain from applying the statutory proscriptions in a particular case if it determines that such action does not adversely affect the public interest. [3] *Wilner & Scheiner*, 58 Rad. Reg. 2d (P&F) at 541. Specifically, the Commission has the statutory authority to evaluate whether or not, in a particular situation, it is in the public interest to permit a person to obtain or to hold a station license notwithstanding the fact that the alien interests in that station exceed the statutory benchmarks. *Id.* at 541. We make such public interest determinations on a case by case basis.

12. In this case, we note that the licensed stations provide common carrier service, and as a result, they involve facilities in which the licensee exercises no control over the content of the transmissions. Under Millicom's proposal, control of its Commission licenses will be in United States citizens hands. More than 90% of the stock of Millicom is held by United States citizens. Millicom's and its subsidiaries' officers are United States citizens. Moreover, 66.7% well over a majority of Millicom's board of directors will continue to be United States citizens. In addition, Millicom affirms that its subsidiaries holding United States common carrier licenses will continue to comply with the foreign ownership limitations of the Communications Act.

13. Furthermore, as Millicom notes, Mr. Metcalfe has invaluable communications expertise, and both non-U. S. citizens are from countries that traditionally have had close and friendly relations with the United States. In addition, the two individuals in question have very strong personal and business ties to the United States. We believe that these factors further support Millicom's proposal and tend to indicate that the non-citizen's participation in the Millicom board of directors would not entail undue foreign influence in the context of traditional national security concerns (*i.e.*, pose a security risk or threaten the security of the United States).

14. We recognize that the Commission has addressed the economic concerns associated with foreign participation in the common carrier market place in making public interest findings. For example, the Commission has examined the possibility of market distortions that may occur due to foreign influence in both domestic and international markets.

15. In this case we do not see any evidence, with regard to traditional Commission concerns relating to economic effects that have compelled the Commission to deny waiver requests in the context of the application of the Commission's international competitive carrier policies. *See e.g. FTC Communications, Inc.*, 2 FCC Rcd. 7513 (1987); *International Competitive Carrier Policies*, 102 F.C.C. 2d 812 (1985), *recon. denied*, 60 Rad. Reg. 2d (P&F) 1435 (1986). *See also Regulatory Policies and International Telecommunications*, 64 Rad. Reg. 2d (P&F) 976 (1988), *recon. granted in part denied in part*, 4 FCC Rcd. 323 (1989). The foreign participation in Millicom's board of directors appears to have no impact in domestic or international markets. As Millicom pointed out, Mr. Metcalfe's experience in international cellular and paging will significantly enhance the development of Millicom's domestic radio common carrier and cellular endeavors, and thereby benefit United States subscribers. Furthermore, as Millicom indicated Mr. Metcalfe's addition to Millicom's

board will assist in assuring the continuing vitality of Millicom's extensive foreign assets, which will in turn preserve both the United States - based jobs provided by Millicom's foreign activities and the value of Millicom to its overwhelmingly United States citizens stockholders.

16. Based on all of the facts in this case, we find that it is in the public interest to permit Millicom to hold its station licenses notwithstanding the fact that the alien interests in the station exceed the statutory benchmarks. We find that the public interest does not require that we refuse to license, or revoke licenses held by Millicom as a consequence of the fact that foreign nationals hold more than twenty-five percent, but substantially less than a majority, of the seats on Millicom's board of directors. Finally, we conclude that the degree of alien participation in Millicom's board of directors would not be contrary to the public interest.

IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, pursuant to delegated authority, 47 C.F.R. Section 0.291, that the request for declaratory ruling IS GRANTED, and the Commission would have no legal objection under Section 310 (b)(4) of the Communications Act to the appointment of Jeremy Metcalfe, a citizen of Great Britain, as a director of Millicom, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Mr. Stenbeck also votes about 5.6% of Millicom's stock.

[2] Millicom's largest stockholder is an irrevocable domestic United States trust, the 1980 Stenbeck Trust. This trust owns approximately 34% of the outstanding stock, operates by majority vote of its trustees, and at least two of its three trustees are always U.S. citizens. All beneficiaries of the trust are U.S. citizens.

[3] In the case of officers, the Commission may prohibit aliens from serving as officers of a company which controls the licensee if it finds that such prohibition would be in the public interest and that an individual's election as an officer would require radio license revocation or denial of renewal. *See International Telephone and Telegraph Corp.*, 67 F.C.C. 2d 604 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — AAD 7-1885

Cost Allocation Manual for the Accounting Separation of the Regulated and Unregulated Costs of AT&T Communications, Inc.

MEMORANDUM OPINION AND ORDER ON REVIEW

Adopted: May 31, 1989; Released: June 13, 1989

By the Commission:

I. INTRODUCTION

1. By a *Memorandum Opinion and Order*, 3 FCC Rcd 1786 (1988), (hereinafter the *AT & T Order)*, the Chief, Common Carrier Bureau, approved, subject to various conditions, the permanent cost allocation manual of American Telephone and Telegraph Company (AT&T) for the separation of regulated and nonregulated costs. On April 29, 1988, Telenet Communications Corporation (Telenet) filed an Application for Review asking that this Commission review and reverse one aspect of the *AT & T Order*. AT&T filed an opposition thereto on May 16, 1988. For the reasons set forth herein, we deny Telenet's Application for Review.

II. BACKGROUND

2. In our *Joint Cost Order*,[1] this Commission adopted standards governing the methods to be used by telephone companies and their affiliates for separating the costs of regulated telephone services from the costs of nonregulated activities. Our ultimate goal was to promote just and reasonable rates for services in the interstate jurisdiction. The standards we adopted establish a system of accounting separation which will inhibit carriers from imposing on ratepayers for regulated interstate services the costs and risks of nonregulated ventures. In the *Joint Cost Order*, we adopted: (1) cost allocation standards and, for certain carriers including AT&T, a requirement that a cost allocation manual reflecting those standards be filed with this Commission; (2) rules for recording transactions between regulated telephone companies and their corporate affiliates; and (3) accounting procedures, audit requirements, and other implementation and enforcement mechanisms.

3. On November 12, 1987, pursuant to the requirements established in the *Joint Cost Order*, AT&T filed its permanent cost allocation manual. Several parties, including Telenet, filed comments on and objections to various portions of AT&T's manual. The only aspect of that proceeding pertinent to the application now before us concerns arguments raised by Telenet regarding transactions between AT&T and its affiliates.

4. Telenet argued to the Common Carrier Bureau that AT&T's manual violated the affiliate transaction rules[2] adopted in the *Joint Cost Order* by failing to require AT&T affiliates using AT&T's Accunet Packet Service (APS) to pay the tariff rate for certain transmission services that interconnect with APS packet switches. Telenet stated that the APS tariff permits APS customers, both affiliated and independent, to obtain underlying transmission services at "embedded cost" rather than at the higher tariffed rate. It stated that the revenues earned by APS since its introduction had not covered the tariffed charges for APS' underlying Dataphone Digital Service (DDS) transmission circuits. Telenet stated that AT&T's unregulated affiliates, and not the public, were the principal users of APS, and it therefore appeared that APS was in fact a device for subsidizing AT&T's unregulated affiliates by supplying DDS services at charges below tariff rates. Telenet asked the Bureau to require AT&T to amend its APS tariff to reprice the service to recover the tariffed rates on the underlying DDS circuits, and to assign as an expense to APS the tariffed rates for the underlying transmission service.

5. In the *AT & T Order*, the Bureau approved AT&T's manual, subject to various conditions. The Bureau rejected Telenet's arguments that the provisions of AT&T's cost allocation manual regarding the use of APS by AT&T's affiliates violated this Commission's affiliate transaction rules. [3] The Bureau noted that Telenet's arguments had previously been raised and addressed in connection with AT&T's APS tariff filing. The Bureau stated that in its *APS Tariff Order*,[4] it concluded that AT&T need not use the DDS tariff rates for pricing the transmission components of the APS tariff. In the *APS Tariff Review Order*, this Commission agreed with the Bureau that AT&T's pricing methods for APS did not warrant investigation at that time.[5] The Bureau concluded in the *AT & T Order* that, because AT&T's manual provided that its affiliates must obtain APS service under tariff, there was no reason to order changes in AT&T's cost manual.

III. THE PLEADINGS

A. Telenet's Application for Review

6. Telenet seeks review of that part of the *AT & T Order* which rejected Telenet's contention that AT&T's cost allocation manual "failed to comply with the Commission's 'Affiliate Transaction' rule . . . ."[6] Telenet claims that review is warranted because the *AT & T Order* rests upon errors of fact and law and is contrary to fundamental policies adopted by this Commission in our *Computer III* proceeding.[7]

7. Telenet first restates various assertions it made in its comments to the Bureau. It notes, for example, that the revenues earned by APS since its introduction in 1984 have never covered the tariffed charges for DDS circuits, much less the other costs of providing APS service. Telenet claims that, because AT&T's unregulated affiliates, and not the public, are the principal users of APS (accounting for roughly 80 to 90% of its total use), APS is in fact a device for subsidizing AT&T's unregulated affiliates

by supplying DDS service at charges far below the tariffed rates for DDS which members of the public (including Telenet) are required to pay. Telenet also asserts that the annual expense attributed to digital circuits assigned to APS using an embedded cost basis was only 60% of the expense for such circuits at tariff rates. It also states that the investment attributed to APS's underlying DDS circuits declined from $14,740,000 as of December 31, 1986, to $9,870,000 as of April 30, 1987, while the actual circuits utilized remained constant and the tariffed rates remained unchanged. Telenet claims that our *Computer III* rules obligate AT&T to pay tariffed rates for underlying transmission services such as DDS for any of its enhanced services offered free of structural separation. Telenet also states that AT&T's Comparably Efficient Interconnection (CEI) plan for "Transaction Services" presented the same embedded cost versus tariffed rates issue as that presented in this proceeding.[8]

8. Telenet claims in its application that the facts enumerated above which it presented to the Bureau present a serious question of whether the intent of the affiliate transaction rules is being complied with, but the Bureau brushed aside the issue by pointing back to the *APS Tariff Order* permitting revisions of AT&T's tariffs to become effective. Telenet claims that in relying on the *APS Tariff Order*, the Bureau is perpetuating a serious factual error. Telenet asserts that analysis of AT&T's projections shows that the increase in APS costs that would result from using tariffed DDS rates rather than embedded costs over the three year projection period would be over $10,000,000, not the $200,000 found by the Bureau in the *APS Tariff Order* and repeated in the *AT & T Order*. Telenet states that the semi-annual reports which AT&T has filed pursuant to the *APS Tariff Order* show that the actual revenue shortfall APS has experienced (which involves the use of embedded costs for the DDS circuits) has been over $25,000,000 in 1986 and 1987. If APS had been charged tariffed rates over this period, the loss would be, Telenet claims, substantially greater.

9. Telenet states that the Bureau scarcely acknowledges the fact that the predominant users of APS are affiliated companies which accounted for 76% of the revenues attributed to APS during the first ten months of 1987, and are projected to account for 68% of APS use in 1988 and 63% in 1989. Telenet claims that no other AT&T service was predominantly used by affiliated companies and that therefore APS merits particularly close scrutiny to ensure that it is not being used as a means of avoiding our affiliate transaction rules. Telenet claims the Bureau's conclusion that AT&T affiliates must obtain APS service under tariff begs what Telenet considers to be the primary question presented by its comments -- whether it is appropriate for AT&T's other DDS customers to be forced to subsidize AT&T's unregulated affiliates, which are permitted to receive APS at tariffed rates which fail to cover the embedded costs of the underlying DDS circuits, much less the tariffed DDS rates. Telenet states that the purpose of the affiliate transaction rules is to ensure that customers of AT&T's regulated services do not subsidize the competitive activities of its unregulated affiliates. Telenet claims that this purpose will be defeated if AT&T is permitted to continue to base its APS tariff rates upon the embedded cost of underlying DDS transmission facilities.

B. AT&T's Opposition

10. AT&T argues that Telenet's application should be denied. AT&T states that the *AT & T Order* is in complete accord with our *Computer III* decisions and rests upon valid factual grounds. AT&T claims that the *Computer III* decisions require its nonregulated affiliates to pay the tariffed rate only for the basic service underlying an enhanced service, and not the tariffed rate for any service that might be viewed as underlying the basic service. AT&T asserts that in the *Transaction Services Order* [9] the Bureau concluded that the *Computer III* requirements are satisfied if an AT&T enhanced service subscribes to APS at the same tariff rates that are available to competing enhanced service providers because APS is the basic service used by the enhanced service. Thus, AT&T claims, our *Computer III* decisions do not require the repricing of APS to reflect the tariffed rates of any basic service which may underly APS.

11. AT&T states that Telenet's claim that APS rates are not set to recover costs and are therefore improperly subsidized by other services is incorrect. AT&T states that even if APS failed to recover its costs there would be no subsidization of its unregulated affiliates by its other ratepayers. AT&T states that the *APS Tariff Order* requires it to account for APS separately "below-the-line" and that therefore AT&T's shareholders, and not the ratepayers, bear the risk of loss if the projected earnings do not materialize. AT&T claims that Telenet's assertions are an improper collateral attack on the Bureau's and this Commission's findings in the *APS Tariff* proceeding.

12. Moreover, AT&T claims that in any event the level of APS earnings is irrelevant to the *AT & T Order*'s conclusions and is beyond the scope of this proceeding. AT&T argues that in approving the portion of its cost manual dealing with affiliate transactions, the Bureau relied only on the facts, not disputed by Telenet that (1) this Commission's rules require that regulated services be sold to affiliates at tariff rates, and (2) under its cost manual AT&T's affiliates must obtain APS service under tariff. AT&T states that the Bureau recognized that the issue of APS earnings had previously been considered by this Commission and is subject to ongoing monitoring, and it properly concluded that there was no reason to expand the scope of this proceeding to consider the APS tariff. Therefore, AT&T claims, Telenet has raised no issue of fact bearing on the validity of AT&T's cost manual.

IV. DISCUSSION

13. We deny Telenet's Application for Review. The *Joint Cost Order* requires that the price of a service a carrier purchases from an affiliated company must be the appropriate state or federal tariffed rate if that service is tariffed.[10] The AT&T cost manual requires that AT&T affiliates taking APS service pay the tariffed rates for that service. This aspect of AT&T's cost manual is therefore in compliance with the requirements of the *Joint Cost Order*. The question of the lawfulness of the rates contained in the tariff is not relevant to our consideration of whether AT&T's cost manual complies with the requirements of our *Joint Cost Order*.[11]

14. Telenet's claim that the *AT & T Order* is inconsistent with the fundamental policies adopted in the *Computer III* proceeding is not valid. In that proceeding we established a regulatory framework for the offering of unregulated, enhanced services by AT&T and the Bell

Operating Companies (BOCs). The *Computer III* rules are intended to limit the ability of these companies to make improper use of their regulated operations for the benefit of these unregulated, enhanced activities. For AT&T, these rules require, *inter alia*, that it must pay the tariffed rate for any basic service underlying its own enhanced services, and must provide others with that basic service at the same rate and on the same terms and conditions. As confirmed in our recent Order approving AT&T's ONA Plan, because of the competition existing in the interexchange market, *Computer III* does not require AT&T to apply to its own enhanced services operations the tariffed rates for interoffice transport channels used in the provision of APS service.[12] Thus, contrary to Telenet's assertions, AT&T's cost manual does not conflict with this Commission's *Computer III* requirements.

V. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934 as amended, 47 U.S.C. §154(i), That the Application for Review filed by Telenet Communications Corporation on April 29, 1988, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on recon.*, 2 FCC Rcd 6283 (1987) (*Joint Cost Reconsideration Order*), *further recon.*, 3 FCC Rcd 6701 (1988), *petition for review pending*, Southwestern Bell Corp. v. FCC, D.C. Circuit No. 87-1764 (filed Dec. 14, 1987).

[2] The affiliate transaction rules are codified in Section 32.27 of the Commission's Rules, 47 C.F.R. §32.27.

[3] *AT & T Order*, 3 FCC Rcd at 1787, para. 13.

[4] AT&T Communications, Inc., Revisions to Tariff F.C.C. No. 4, 6, and 10, Mimeo No. 3264, released March 25, 1986 (*APS Tariff Order*), *aff'd*, 2 FCC Rcd 588 (1987) (*APS Tariff Review Order*).

[5] *APS Tariff Review Order*, 2 FCC Rcd at 590, para. 19.

[6] Telenet Application at 1.

[7] Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 FCC 2d 958 (1986) (*Computer III Phase I Order*), *recon.* 2 FCC Rcd 3035 (1987), *further* recon., 3 FCC Rcd 1135 (1988), *second further recon. pending;* 2 FCC Rcd 3072 (1987) (*Computer III Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988), *further recon. pending.*

[8] Subsequent to the filing of the Application now before us, the Bureau rejected Telenet's argument concerning the CEI requirement under our *Computer III* rules. American Telephone and Telegraph Company, Plan for the Provision of Transaction Services, 3 FCC Rcd 2702 (1988) (*Transaction Services Order*). Telenet made similar assertions with regard to AT&T's Open Network Architecture (ONA) plan. In our *Open Network Architecture Order*, we rejected that claim. *See* Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 2449 (1988) (*Open Network Architecture Order*), and note 12, *infra*.

[9] *Id.*

[10] *Joint Cost Order*, 2 FCC Rcd at 1336, para. 299. *See also Joint Cost Reconsideration Order*, 2 FCC Rcd at 6296, para. 123.

[11] The lawfulness of basic service rate levels properly is addressed in tariff-related proceedings.

[12] *Open Network Architecture Order*, 4 FCC Rcd at 2454, paras. 37-40. In its comments on AT&T's ONA plans, Telenet argued that AT&T should be required to "unbundle" its APS offering into two components, digital transport and switching, with the digital transport element of APS priced at the same tariffed rates as AT&T's interoffice DDS circuits. In our *Open Network Architecture Order*, paras. 37-41, we rejected Telenet's contentions. We noted that in our *Computer III Phase II Order* we imposed different requirements on AT&T than we did on the BOCs. We required the BOCs to apply the tariffed rates for the interoffice channels related to the provision of packet service to their own enhanced service operations. We did not place on AT&T the same requirement; instead, we required AT&T to satisfy a general nondiscrimination requirement concerning the basic service it uses in providing its enhanced services, including protocol conversion. A less onerous requirement was placed on AT&T than on the BOCs because of the higher level of competition in the interexchange market in which AT&T operates. We therefore found that AT&T's proposed level of unbundling for APS satisfies the relevant CEI requirements.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERITECH	AAD 7-1696
BELL ATLANTIC	AAD 7-1599
BELLSOUTH	AAD 7-1601
	AAD 7-1695
NYNEX	AAD 7-1680
PACIFIC TELESIS	AAD 7-1611
SOUTHWESTERN BELL	AAD 7-1657
U S WEST	AAD 7-1610

Accounting Plans for Nonregulated
Activities Conducted During 1987

MEMORANDUM OPINION AND ORDER

Adopted: June 6, 1989; Released: June 15, 1989

By the Chief, Common Carrier Bureau:

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I. INTRODUCTION

1. In 1987, the Bell Operating Companies (BOCs) filed interim cost allocation plans (the Part 31 plans) describing the manner in which they would separate the costs of certain nonregulated activities from the costs of their regulated service. These plans proposed procedures to account for the costs of such nonregulated functions as the planning, research, and development of enhanced services on a structurally unseparated basis. Several of these plans also addressed cost accounting for the limited marketing of customer premises equipment (CPE) on a structurally unseparated basis. The Part 31 plans were based on the Uniform System of Accounts (USOA) then contained in Part 31 of the Commission's Rules. The interim plans were implemented during a limited period in 1987, and were superseded on January 1, 1988, by permanent cost allocation manuals based on the new USOA contained in Part 32. Each BOC subsequently provided data showing the extent to which costs were allocated to the nonregulated activities covered by its plan in 1987.

2. In this *Memorandum Opinion and Order*, we review the reasonableness of the interim cost allocation plans. Many issues raised by the plans are similar, and we consider them in one consolidated proceeding. Our evaluation of the Part 31 plans is aided by the comments submitted by interested parties, as well as the cost data filed by the carriers. In resolving this matter, we are also guided by considerations such as the number and scope of nonregulated functions covered by the interim plans; the time period during which the plans remained in effect; the impact of the plans on ratepayers during this period; our subsequent approval of carriers' comprehensive Part 32 cost allocation manuals; and the prudent use of administrative resources. Moreover, our experience in administering the Commission's cost allocation regime since 1987 teaches that submission and review of cost allocation manuals is a process that has evolved over time. We have

refined and improved our standards for evaluating cost allocation procedures over the last two years. Likewise, the carriers have gained an enhanced understanding of their task in the course of submitting and revising their comprehensive Part 32 manuals. With these considerations in mind, and as explained more fully below, we hereby approve the carriers' Part 31 plans and terminate these proceedings.

II. BACKGROUND

3. We reviewed the history of this proceeding in the *Accounting Information Order*.[1] As we recounted in that *Order*, the Commission replaced the structural separation requirements of Section 64.702 of the Commission's Rules with the nonstructural safeguards adopted in the *Computer III*[2] and *BOC Structural Relief* [3] proceedings. One such nonstructural safeguard is the requirement that BOCs desiring to provide enhanced services or CPE on an integrated basis must obtain approval of manuals which separate their regulated costs from the costs of nonregulated activities. In the *Joint Cost Order*,[4] the Commission established principles governing carriers' separation of regulated and nonregulated costs. The Commission also required the BOCs to file manuals describing the methods by which they proposed to implement the cost allocation standards enunciated in the *Joint Cost Order*. These cost manuals were to be filed by September 1, 1987, and were to become effective on January 1, 1988, after an opportunity for public comment. These permanent cost manuals were to be based on the new USOA contained in Part 32 of the Commission's Rules, which became effective January 1, 1988, and superseded Part 31. However, the Commission recognized that some BOCs might wish to implement structural relief prior to January 1, 1988. Accordingly, the Commission required any BOC desiring to implement structural relief in 1987 to file a cost manual based upon the Part 31 rules then in effect.[5]

4. Initially, the BOCs did not submit comprehensive Part 31 cost manuals as contemplated by the Commission in the *Joint Cost Order*. Instead, the BOCs requested permission to conduct certain limited, nonregulated activities, such as enhanced services planning or provision of CPE, before they had an approved, comprehensive cost manual.[6] We required each BOC seeking such relief to file an interim Part 31 cost allocation plan based upon the principles established in the *Joint Cost Order*.[7] All seven BOCs filed interim Part 31 plans. These plans are not comprehensive in scope. Rather, the BOC's cost allocation procedures generally address only those limited enhanced services and CPE activities that they intended to provide on an integrated basis during 1987. All of these Part 31 plans were placed on public notice.[8]

5. On December 28, 1987, we conditionally approved -- subject to the filing of additional information and explanation -- the permanent Part 32 manuals the BOCs had filed pursuant to the *Joint Cost Order*.[9] We did not rule on the interim Part 31 plans at that time, because those plans did not address all of the BOCs' nonregulated activities and approval of a comprehensive cost allocation manual was a precondition to complete relief from the structural separation requirements.[10]

6. In the *Accounting Information Order*, released June 10, 1988, we directed each BOC to file an account-by-account analysis showing the extent to which costs were allocated to the nonregulated activities covered by its Part 31 plan in 1987.[11] We noted that the Part 31 plans covered only a limited number of functions related to the provision of CPE and enhanced services planning, and that such activities may have been conducted only for a limited time during 1987. We sought to determine whether these activities may have involved so few costs that extensive analysis of the Part 31 plans might be an imprudent use of administrative resources. Accordingly, we requested this additional accounting information from the BOCs to enable us to assess the need for further proceedings regarding the interim cost plans.[12] The BOCs filed the requisite data in August of 1988.

III. DISCUSSION OF INDIVIDUAL PLANS

A. *Ameritech*

1. *The Interim Plan*

7. The Ameritech Operating Companies (Ameritech)[13] filed an interim cost allocation plan on September 1, 1987, in accordance with the *Ameritech - U S West Order*.[14] The plan specifies the cost allocation methodology Ameritech proposed to apply to activities associated with the planning, research, and development of enhanced services by the regulated companies. The major parts of the plan include an introduction, a description of enhanced services planning activities, and sections addressing corporate organization, transactions with affiliates, cost apportionment methodology, and accounting procedures. The section on cost apportionment methodology describes and defines the following categories of costs associated with enhanced services planning: directly assignable costs, directly attributable costs, indirectly attributable costs, and unattributable costs. The plan includes an appendix, which sets forth Ameritech's cost apportionment methodology for enhanced services planning in a matrix format. The matrix lists each Part 31 account that will be apportioned, describes the costs associated with enhanced services planning included in each account, and identifies the apportionment basis and cost definition applicable to each item. The plan was in effect for the period from July 27, 1987 (the effective date of the *Ameritech - U S West Order)* until January 1, 1988.

2. *Comments*

8. Ameritech's Part 31 plan was placed on public notice.[15] We received no comments addressing the sufficiency of the plan.

3. *Supplemental Data*

9. Ameritech filed supplemental 1987 cost data on August 12, 1988, in accordance with the *Accounting Information Order*.[16] The data reveal that operating expenses associated with enhanced services planning were apportioned to the nonregulated side in four accounts in 1987. Total operating expenses apportioned to nonregulated activities in 1987 under Ameritech's interim plan were $99,000.

4. *Discussion*

10. Our review of Ameritech's Part 31 plan and supplemental cost data reveals no significant problems regarding allocation procedures or misallocation of costs. We note that we received no comments concerning Ameritech's plan. We also note the limited number of nonregulated functions and insignificant level of activity associated with the plan. No further inquiry is necessary under these circumstances. In view of its limited applicability and *de minimis* impact on ratepayers, we find that approval of Ameritech's plan is warranted.

B. *Bell Atlantic*

1. *The Interim Plan*

11. The Bell Atlantic Telephone Companies (Bell Atlantic)[17] filed an interim cost allocation plan on April 7, 1987, and an addendum on April 20, 1987, in accordance with the *Enhanced Services Planning Order*.[18] The plan specifies the cost allocation methodology Bell Atlantic proposed to apply to activities associated with enhanced services planning and limited joint marketing of CPE and network services. The major sections include an overview of accounting and cost principles, a description of activities, as well as sections addressing time reporting, other expenses, the general allocator, and management controls. The addendum sets forth Bell Atlantic's cost allocation methodology in a matrix format. The matrix lists each Part 31 account that will be apportioned, the apportionment basis for each account, the applicable cost definition, and comments.

2. *Petition for Evidentiary Hearings*

12. The Mid-Atlantic Telephone Consumer Advocates (MATCA)[19] filed a Petition for Order Requiring Additional Evidentiary Proceedings for Approval of Bell Atlantic Cost Allocation Manuals on May 22, 1987. Bell Atlantic filed an opposition to MATCA's petition, and MATCA filed a reply to Bell Atlantic's opposition. MATCA asks the Commission to institute full trial-type evidentiary hearings to inquire into the sufficiency of Bell Atlantic's Part 31 plan.[20]

13. MATCA asserts that evidentiary hearings are required because Commission review and approval of cost allocation plans is effectively a prescriptive order, for which MATCA submits the Communications Act and the Administrative Procedure Act (APA) require trial-type hearings. MATCA contends that cost allocation procedures are directly linked to rates, noting that the cost allocation practices approved by the Commission will determine the revenue requirement for a particular carrier, and thus will effectively determine the rates to be charged for that carrier to achieve its prescribed rate of return. MATCA views Commission approval of Bell Atlantic's cost allocation plan as not only the prescription of a practice but the prescription of rates as well. MATCA cites *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975), in support of its assertion that Commission approval of cost allocation practices is a prescriptive order.[21] MATCA claims that once Commission approval of cost allocation practices is properly viewed as a prescription, Section 205(a) of the Communications Act, 47 U.S.C. § 205(a), requires "a full opportunity for hearing" before the Commission can approve a carrier's cost allocation manual.[22]

14. MATCA next argues that the "full opportunity for hearing" requirement of Section 205(a) invokes the trial-type hearing requirements contained in the APA.[23] MATCA concedes that the applicable sections of the Communications Act do not contain the precise language held necessary by the Supreme Court to trigger formal trial-type proceedings.[24] However, MATCA submits that review of cost allocation manuals is adjudicatory in nature. MATCA also cites cases in which courts have required trial-type hearings based on the adjudicatory nature of the proceedings even when the applicable statute did not specify "on the record" proceedings.[25] MATCA also claims that the Communications Act itself requires trial-type hearings independently of the APA requirements.[26] Finally, MATCA suggests that the Commission can order "enhanced evidentiary procedures," including opportunity for submission of written questions and other rigorous discovery techniques, even if it declines to order trial-type hearings.[27]

15. In its opposition, Bell Atlantic disputes the claim that Commission review of its cost allocation plan is essentially a prescription of rates subject to Section 205(a) of the Communications Act. Bell Atlantic offers examples of other Commission accounting proceedings, such as depreciation rate prescriptions, which have an impact on rates but do not involve the actual prescription of rates. Bell Atlantic notes that the Commission does not conduct trial-type hearings in any of these proceedings.[28] Bell Atlantic also challenges MATCA's interpretation of the *Nader* case with respect to whether review of cost manuals is equivalent to a prescriptive order concerning rates.[29] Finally, Bell Atlantic attacks MATCA's analysis concerning APA requirements for trial-type hearings. Bell Atlantic argues that even if Section 205(a) is applicable, the requisite "on the record" language is not present in the Communications Act, and thus the Commission satisfies the "full opportunity for hearing" language of Section 205(a) by providing a full opportunity to submit written comments and replies.[30]

16. In reply to Bell Atlantic's opposition, MATCA asserts that Bell Atlantic misconstrues the holding of *Nader*. According to MATCA, *Nader* teaches "that Commission orders not in themselves prescribing rates but determining and prescribing elements that make up rates are prescriptions for purposes of Sec[tion] 205(a)."[31] MATCA also contends that Bell Atlantic ignores well-defined qualifications to the Supreme Court's holding regarding "on the record" statutory language.[32] Finally, MATCA states that Bell Atlantic refuses to acknowledge the adjudicatory nature of orders approving carriers' cost allocation manuals.[33]

17. *Discussion*. We deny MATCA's request for evidentiary hearings concerning the sufficiency of Bell Atlantic's cost allocation plan. As a threshold matter, we do not think that Commission approval of carriers' cost allocation procedures may properly be characterized as a prescriptive order concerning rates which might trigger the hearing requirement of Section 205(a). Far from prescribing the actual rates a carrier must charge for its services, an order approving a carrier's cost allocation plan simply represents our judgment that the carrier's proposed cost allocation procedures meet the Commission's standards for allocating costs between regulated and nonregulated operations.

18. Although cost allocation procedures dictate which costs are properly apportioned to regulated operations, and thus help determine the carrier's revenue requirement, this indirect affect on rates is not an effective *prescription* of the carrier's rates. The causal link between cost allocation procedures and rates is simply too tenuous to support MATCA's assertion that Commission approval of a carrier's cost allocation plan is effectively a prescription of that carrier's rates as well. We conclude that Commission approval of cost allocation plans is not a prescriptive order within the scope of Section 205(a). It follows that the hearing requirement of that section is not applicable to the cost allocation manual review process.[34]

19. Moreover, even if approval of cost allocation plans could be deemed a prescriptive order under Section 205(a), we believe our current notice and comment procedures fully satisfy the mandate of that section. Neither the APA nor the Communications Act requires trial-type evidentiary hearings in this type of proceeding. Section 205(a) of the Communications Act empowers the Commission to prescribe, *inter alia*, practices such as cost allocation procedures "after full opportunity for hearing," 47 U.S.C. § 205(a). As Bell Atlantic correctly observes,[35] Section 205(a) does not contain the requisite "on the record after opportunity for an agency hearing" language which triggers trial-type evidentiary hearings under Sections 553 and 554 of the APA. *See American Tel. & Tel. Co. v. FCC*, 572 F.2d 17, 22 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978); *U. S. v. Florida East Coast Railway Co.*, 410 U.S. 224, 234-38 (1973). In *AT & T*, which involved a Commission order prescribing unlimited resale and sharing of private line services, the Second Circuit observed that "the words 'on the record' have become . . . a 'touchstone test' for the applicability of the APA's trial-type procedures." *AT & T*, 572 F.2d at 22 (quoting *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1250 (D.C. Cir. 1973)). The court noted that this language is lacking in Section 205(a) of the Communications Act, and concluded therefore that "the APA does not require trial-type procedures here." *Id.* The court also stressed that the "after full opportunity for hearing" language of Section 205(a) did not require formal evidentiary hearings independently of the APA. Rather, the court concluded that, "'depending upon the requirements of the particular case,'" notice and comment procedures fully satisfy the requirements of that section. *Id.* at 22.[36]

20. The notice and comment procedures employed here are entirely adequate for the purposes of this proceeding.[37] As MATCA concedes, the *Joint Cost Order* was clearly a policy-type *Rule Making* proceeding, adopting rules and standards for carriers to observe when allocating costs between their regulated and nonregulated activities.[38] Carrier submission of cost allocation plans in accordance with the *Joint Cost Order*, and Bureau review and approval of those plans, is part of the overall process of implementing the Commission's cost allocation rules and policies. Far from being adjudicatory proceedings, which might require more elaborate procedures, we view the cost allocation manual review process as simply an extension of the Commission's Rule Making initiative under the *Joint Cost Order*. *See AT & T*, 572 F.2d at 22. In this context, protracted trial-type evidentiary hearings would hopelessly bog down the review process without enhancing the analysis of carriers' cost allocation procedures.

21. We conclude that our current procedures have provided interested parties with a meaningful opportunity to participate in the review process, while permitting that process to proceed in an expeditious manner. We therefore deny MATCA's petition for evidentiary hearings concerning the sufficiency of Bell Atlantic's cost allocation plan.

3. ***Other Comments***

22. Bell Atlantic's plan was placed on public notice.[39] Telenet Communications Corporation (Telenet), Maryland People's Counsel (MPC), and the Alarm Industry FCC Advisory Committee (AIFAC) filed comments. Bell Atlantic and MPC filed reply comments.

23. All commenters allege generally that Bell Atlantic's plan lacks detail and fails to meet the requirements of the *Joint Cost Order*. Telenet characterizes Bell Atlantic's plan as grossly incomplete and inadequate.[40] MPC argues that Bell Atlantic's plan is so cursory that it cannot be regarded as constituting a cost allocation manual,[41] and fails when measured by the Commission's criteria for interim cost plans.[42] AIFAC contends that Bell Atlantic's plan is unreasonably vague.[43]

24. More specifically, MPC cites Bell Atlantic's failure to maximize attribution and minimize the use of the general allocator.[44] MPC also disputes Bell Atlantic's proposal that time spent by individuals who merge joint CPE-network proposals or plan installation of such arrangements be split evenly between Bell Atlantic and Bell Atlanticom, contending that this procedure presents an opportunity for cross-subsidy.[45] Further, MPC contends that Bell Atlantic fails to address how pre-joint marketing costs will be captured and allocated to nonregulated accounts.[46] Finally, MPC argues that booking CPE-related expenses of Network Services Group personnel to a below-the-line account without billing the CPE affiliate, as Bell Atlantic proposes, will result in few costs being recorded below-the-line and will encourage cross-subsidy.[47]

25. AIFAC cites a deficiency in Bell Atlantic's discussion of the allocation of investment or investment-related overheads.[48] AIFAC finds a similar lack of detail in Bell Atlantic's description of its salary and wage allocation process.[49] Further, AIFAC asserts that the plan does not contain a description of the methodology used to capture non-productive time.[50] Finally, AIFAC contends that the Commission should require Bell Atlantic to account for its nonregulated expenses already incurred for activities covered by the plan.[51] In this regard, AIFAC expresses concern over the cost allocation treatment of testing activities associated with the planning and filing of Bell Atlantic's Comparably Efficient Interconnection (CEI) plan. AIFAC further asserts that Bell Atlantic's CEI plan is flatly inconsistent with the requirements of the *Joint Cost Order*, and thus questions how Bell Atlantic's Part 31 plan, which supports its CEI plan, can be consistent with the Commission's cost allocation requirements.[52]

26. In reply, Bell Atlantic maintains that commenters misunderstand the nature of its interim cost allocation plan. Bell Atlantic states that its plan is not intended to be a comprehensive cost allocation manual covering a wide variety of joint and common costs. Rather, Bell Atlantic points out that the plan is confined to the allocation of the few joint and common costs associated with enhanced services planning and joint marketing of CPE and network services. Bell Atlantic asserts that the limited scope of its plan is consistent with Commission requirements

for interim plans.[53] Finally, Bell Atlantic responds to each major alleged deficiency by either attacking the argument advanced by the commenter,[54] or by maintaining that the objection is based upon a misapprehension of the proper scope of the interim plan.[55]

4. *Supplemental Data*

27. Bell Atlantic filed supplemental 1987 cost data on August 9, 1988, in accordance with the *Accounting Information Order*. The data reveal that operating expenses associated with enhanced services planning and limited joint marketing of CPE and network services were apportioned to the nonregulated side in fourteen accounts in 1987. Direct costs assigned to the nonregulated side total $292,937. Common costs apportioned to the nonregulated side total $93,730, for a total of $386,667.

5. *Discussion*

28. We have reviewed Bell Atlantic's Part 31 plan and supplemental cost data, as well as the comments filed by interested parties. Commenters are correct in noting a general lack of detail in the plan. We would prefer more specific interim allocation procedures, and do require much more rigorous detail in carriers' permanent Part 32 cost manuals. However, the limited number of nonregulated functions, the short timeframe involved, and the relatively insignificant level of activity associated with Bell Atlantic's Part 31 plan do not call for the scope and detail required of carriers' comprehensive Part 32 cost manuals.

29. Commenters raise some legitimate issues regarding certain aspects of Bell Atlantic's interim plan. We share the concern of MPC regarding Bell Atlantic's apparent failure to minimize the use of the general allocator. We also agree with MPC's criticism of Bell Atlantic's proposal to apportion the time spent by individuals who merge joint CPE-network proposals equally between Bell Atlantic and Bell Atlanticom. We generally require more cost-causative apportionment methods when available, particularly with respect to the permanent Part 32 manuals. However, Bell Atlantic's use of these methods in these limited circumstances does not raise significant cost allocation implications, nor do we have reason to conclude that the allocation procedures imposed excessive costs on ratepayers in 1987.

30. The comments raise other specific issues which would merit heightened scrutiny if we were reviewing a permanent cost manual. In fact, many points made by the commenters are similar to criticisms advanced in relation to Bell Atlantic's Part 32 manual. These issues have, for the most part, been resolved in that proceeding, and Bell Atlantic now has in place an approved, comprehensive Part 32 manual which governs the separation of joint costs incurred with respect to its nonregulated activities. We are persuaded that Bell Atlantic's interim Part 31 plan, while far from perfect, provides a reasonable framework for allocating the limited costs associated with its nonregulated activities during the short time period the plan was in effect. Viewed in the context of interim plans, we find no significant deficiencies regarding Bell Atlantic's allocation procedures that require revisions at this time. We conclude that approval of the plan is warranted in light of its limited applicability.

C. *BellSouth*

1. *The Interim Plans*

31. BellSouth Corporation, South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company (BellSouth) filed two interim cost allocation plans in 1987. BellSouth filed an initial plan on April 7, 1987, in accordance with the *Enhanced Services Planning Order*.[56] The April 7 plan specifies the cost allocation methodology BellSouth proposed to apply to activities associated with joint planning, research, and development of enhanced services. That plan's major sections include an introduction, a description of activities, a section outlining the conduct of joint planning, research, and development of enhanced services, and a section describing the apportionment of costs between nonregulated enhanced planning and regulated activities.

32. BellSouth filed a second plan on August 28, 1987, in accordance with the *Southwestern Bell - BellSouth Order*.[57] The August 28 plan specifies the cost allocation methodology BellSouth proposed to apply to activities associated with the limited joint marketing of CPE and regulated network services. That plan's major sections include an introduction, a description of the joint marketing plan, a section describing joint marketing activities that result in billings between affiliates, and a summary. The August 28 plan also contains cost apportionment tables in a matrix format. The matrix lists each Part 31 account to be apportioned, the cost pools included in each account, the basis for apportionment to cost pools, the basis for apportionment to regulated/nonregulated, the cost definition for each item, and any additional comments.

2. *Comments*

33. *The April 7 Plan*. BellSouth's April 7 plan was placed on public notice.[58] MCI Telecommunications Corporation (MCI) and the Ad Hoc Telecommunications Users Committee (Ad Hoc) filed comments. BellSouth filed reply comments.

34. MCI and Ad Hoc allege that BellSouth's plan does not contain the detail required by the *Enhanced Services Planning Order* and the *Joint Cost Order*. MCI asserts that BellSouth's submission does not provide cost estimates or any well-defined basis to show that the costs at issue are likely to be minimal.[59] MCI further argues that the plan does not establish an adequate cost record structure to permit effective auditing of the development costs.[60]

35. Ad Hoc maintains that BellSouth's plan fails to provide a methodology which addresses each USOA account and subaccount, but rather refers only to Account 106, Nonregulated Investments.[61] Ad Hoc also contends that the plan is deficient with respect to addressing affiliate transactions.[62] Further, Ad Hoc points to the brevity of BellSouth's plan as evidence of its inadequacy.[63] Finally, Ad Hoc asserts that the plan fails to satisfy the underlying purpose of the Commission's rules by failing to provide meaningful cost allocation procedures that can be effectively evaluated at the outset and audited after implementation.[64]

36. In reply, BellSouth maintains that MCI and Ad Hoc mistakenly assume that the interim cost plan, which relates to a very limited group of specific nonregulated activities, must be of the scope and contain the detail required of comprehensive cost allocation manuals by the

Commission in the *Joint Cost Order*.[65] BellSouth asserts that its plan fully comports with the Commission's requirements for interim plans.[66] As for MCI's objections over the sufficiency of costing detail, lack of cost estimates, and the adequacy of cost structure to permit effective auditing, BellSouth contends that there is no requirement that its interim plan contain such information. [67] BellSouth also maintains that its plan includes sufficient information regarding affiliate transactions.[68] Finally, BellSouth emphasizes that all of its joint research and development services will be performed in BellSouth Services Incorporated (BSSI), a nonregulated affiliate assertedly subject to neither the Commission's *Joint Cost Order* nor the Part 31 or Part 32 Rules. Since all defined services are to be performed in BSSI and billed to the regulated companies, BellSouth contends that only Account 106 is affected, and therefore its plan need not provide a breakdown of each USOA account and subaccount as Ad Hoc argues.[69]

37. *The August 28 Plan*. BellSouth's August 28 plan was placed on public notice.[70] American Telephone and Telegraph Company (AT&T) filed comments. BellSouth filed reply comments.

38. AT&T maintains that although BellSouth's plan appears to comply generally with the objectives and principles of the *Joint Cost Order*, the plan fails in two respects to reflect properly the nonregulated use of common costs.[71] AT&T contends that BellSouth's plan is deficient in that it provides no procedures for allocation of joint investment,[72] and fails to allocate certain major categories of common expenses such as general supervision and clerical support.[73] In reply, BellSouth asserts that its plan fully complies with the standards and procedures set forth in the *Joint Cost Order*.[74] BellSouth states that allocable costs related to joint investment and common expenses are limited to two activities, *i.e.*, the merging of sales proposals, and functions performed by a single point of contact for both regulated and nonregulated activities. In the limited instances when these common costs occur, BellSouth notes that its plan specifically provides for allocating these costs equally between regulated and nonregulated operations.[75]

3. *Supplemental Data*

39. BellSouth filed supplemental 1987 cost data on August 10, 1988, in accordance with the *Accounting Information Order*. The data are listed separately for enhanced services planning activities governed by the April 7 plan, and CPE limited joint marketing activities governed by the August 28 plan. All costs associated with enhanced services planning were recorded in Account 106, Nonregulated Investments, in 1987. There were no common costs identified with enhanced services planning activities. Pursuant to the April 7 plan, $88,682 was recorded in Account 106 for Southern Bell, and $89,047 was recorded in Account 106 for South Central Bell.

40. The data for the August 28 plan reveal that costs associated with CPE limited joint marketing were apportioned to the nonregulated side in eleven operating expense accounts in 1987. These costs total $8,486 for Southern Bell and $29,999 for South Central Bell. Of the $8,486 total amount for Southern Bell, $7,251 was directly assigned to three accounts. Common costs for Southern Bell total $1,235, and involved eight accounts. Of the $29,999 total apportioned to the nonregulated side for South Central Bell, $26,205 was directly assigned to three accounts. Common costs for South Central Bell total $3,794, and involved eight accounts.

41. The total of costs apportioned to all nonregulated activities in 1987 under both of BellSouth's interim plans is $97,168 for Southern Bell. The total for South Central Bell is $119,046.

4. Discussion

42. We have reviewed BellSouth's Part 31 plans and supplemental cost data, as well as the comments filed by interested parties, and find no significant deficiencies regarding BellSouth's allocation procedures. Commenters are correct in noting a general lack of detail in the plans. However, the limited number of nonregulated functions, the short timeframes involved, and the relatively insignificant level of activity associated with BellSouth's Part 31 plans do not call for the scope and detail we have required of carriers' comprehensive Part 32 manuals. The April 7 plan provides adequate procedures for the relatively straightforward situation in which a nonregulated affiliate conducts planning activities for a carrier in advance of the actual provision of nonregulated services. With respect to the August 28 plan, we share to some extent AT&T's concern over the allocation of joint investment and common expenses. We generally discourage the use of a simple equal allocation of common costs, since this approach is unlikely to reflect true cost causality. However, BellSouth's limited use of a 50/50 allocator for the sole purpose of apportioning the costs associated with merging sales proposals and single point of contact activities does not raise significant problems of cost allocation in these circumstances. Thus, despite minor deficiencies noted by the commenters, we find approval of BellSouth's plans to be warranted in view of their limited applicability and *de minimis* impact on ratepayers.

D. *NYNEX*

1. *The Interim Plan*

43. The NYNEX Telephone Companies (NYNEX)[76] filed an interim cost reasonable allocation plan on August 7, 1987, pursuant to the *Joint Cost Order*.[77] The plan specifies the cost allocation methodology NYNEX proposed to apply to remove, for regulatory purposes, all fully distributed costs associated with the joint planning, research, and development of enhanced services. The plan includes sections describing direct costs, directly attributable costs, indirectly attributable costs, and unattributable costs associated with enhanced services planning activities. The plan also includes a section addressing accounting issues. An apportionment matrix sets forth each account included in the plan, as well as the apportionment basis NYNEX proposes to apply to each Part 31 account or subaccount. The plan was in effect for the period from October 30, 1987 (the release date of the *NYNEX Waiver Order)* until December 31, 1987.

2. *Comments*

44. The NYNEX plan was placed on public notice.[78] We received no comments addressing its sufficiency.

3. *Supplemental Data*

45. NYNEX filed supplemental 1987 cost data on August 9, 1988, in accordance with the *Accounting Information Order*. The data show the results obtained by the plan in 1987, and are provided separately for New England Telephone and New York Telephone. For New England Telephone, the data reveal that operating expenses associated with enhanced services planning were apportioned to the nonregulated side in one account in 1987. Direct expenses assigned to enhanced services planning were $1,452 in Account 674, General Services and Licenses.

46. For New York Telephone, the data reveal that costs associated with enhanced services planning were apportioned to the nonregulated side in fifteen operating expense accounts in 1987. Direct costs assigned to enhanced services planning total $8,213. Common expenses apportioned to enhanced services planning total $3,113.

4. *Discussion*

47. Our review of the NYNEX Part 31 plan and supplemental cost data reveals no significant problems regarding allocation procedures or misallocation of costs. We note that we received no comments concerning the NYNEX plan. We also note the limited number of nonregulated functions and insignificant level of activity associated with the plan. Moreover, the plan was in effect for only two months in 1987. No further inquiry is required under these circumstances. We find approval of the NYNEX plan to be warranted in view of its limited applicability and *de minimis* impact on ratepayers.

E. *Pacific Telesis*

1. *The Interim Plans*

48. Pacific Telesis Group filed separate interim cost allocation plans on behalf of its operating telephone companies, Pacific Bell (Pacific) and Nevada Bell (Nevada), on May 8, 1987, in accordance with the *Pacific Order*.[79] The Pacific plan specifies the cost allocation methodology Pacific Bell proposed to apply to the following nonregulated activities in 1987: inside wiring, public packet switching (protocol conversion), training services, software sales, Project Victoria (protocol conversion and CPE), voice store and forward (subject to United States District Court approval), and enhanced services planning and development. The plan's major sections include an introduction, a description of cost identification and allocation procedures, and product summaries. The section on cost identification and allocation procedures specifies the methodology Pacific proposed with respect to revenue identification, expense identification, allocation methods, reporting procedures, and investment identification. The plan includes an appendix which contains cost apportionment tables in a matrix format. The matrix lists each Part 31 account that will be apportioned, the cost pool names within each account, the cost pool identification basis, the cost pool allocation method, and comments. The plan also includes a table describing general services provided to nonregulated affiliates and a chart illustrating Pacific's affiliates.

49. The Nevada plan specifies the cost allocation methodology Nevada Bell proposed to apply to the following nonregulated activities in 1987: digital network channel terminating equipment, inside wiring, planning and development of enhanced services, loaner set program, and joint marketing with CPE vendors. The major sections include an introduction, product summaries, as well as sections describing time reporting procedures, cost accounting procedures, affiliate transactions, activities treated as incidental, and Nevada Bell affiliates.

2. *Comments*

50. The Pacific and Nevada plans were placed on public notice.[80] AT&T, the Direct Marketing Association (DMA), and Telenet filed comments. Pacific Bell and Nevada Bell filed reply comments. Pacific and Nevada also submitted modifications and clarifications to their respective interim plans in an effort to address the concerns expressed by commenters.

51. While conceding that the Pacific and Nevada plans comply generally with the Commission's requirements for interim plans,[81] commenters identified numerous alleged, highly-specific deficiencies of the interim plans. Most of the comments focused on the alleged deficiencies of the Pacific plan.

52. AT&T notes that Pacific's plan states generally that packet switching and protocol conversion costs, including network administration costs, are to be allocated between regulated and nonregulated operations. AT&T points out, however, that the plan's detailed procedures assign all of Accounts 621, General Traffic Supervision, and 624, Operators' Wages, to regulated operations.[82] AT&T also suggests that Pacific's plan incorrectly assigns all of the investment in smaller equipment items recorded in Account 261.8, Embedded Investment, to regulated operations.[83]

53. DMA and Telenet challenge Pacific's allocation of uncollectible revenues by use of the ratio of total nonregulated revenue to total revenue, and argue that bad debt experience is likely to be higher for nonregulated activities than for regulated undertakings.[84] Telenet notes further that Pacific's plan makes no mention of how service credits will be tracked and recorded.[85] DMA also questions the allocation ratio of salaries used to apportion land and buildings in Accounts 211 and 212.[86]

54. Telenet disputes Pacific's use of transfer pricing insJoint *Cost Order* for recording the value of affiliate transactions.[87] Telenet also notes certain ambiguities in Pacific's description of time reporting procedures and requests more detail.[88] Telenet further argues that not all fringe benefits are included in Pacific's list of fringe benefits to be allocated.[89]

55. In addition, Telenet notes that Pacific does not explicitly specify how its general allocator is computed.[90] Further, Telenet expresses concern over Pacific's reliance on engineering studies, rather than marketing studies, for allocation of jointly used investment.[91] Telenet also suggests that Pacific include a more detailed cost apportionment table in its plan.[92]

56. Finally, Telenet specifies two alleged deficiencies with respect to Nevada's plan. Telenet contends that Nevada's proposal to allocate network plant based on current utilization conflicts with the *Joint Cost Order*.[93] Telenet also argues that Nevada's plan to allocate advertising expense based on revenues is inappropriate.[94]

57. In reply, Pacific and Nevada contend that their plans comply with the objectives and principles for interim cost plans set forth in the *Joint Cost Order*.[95] Both companies offer detailed reply comments addressing each individual deficiency raised by commenters. Pacific and

Nevada respond to each alleged deficiency by either disputing the arguments advanced by commenters,[96] or by modifying or clarifying their plans in an effort to address the concerns expressed by commenters.[97]

3. ***Supplemental Data***

58. Pacific Telesis Group filed supplemental 1987 cost data on behalf of Pacific and Nevada on August 12, 1988, in accordance with the *Accounting Information Order*. The data are listed separately by carrier. Unlike the data provided by other BOCs, the Pacific and Nevada data involve many accounts and encompass all of the carriers' nonregulated activities as opposed to certain select CPE joint marketing or enhanced service planning activities. Pacific and Nevada request confidential treatment of information contained in their data submissions.[98]

4. ***Discussion***

59. We have reviewed the Pacific and Nevada Part 31 plans and supplemental cost data, as well as the comments filed by interested parties. We note that these plans cover a variety of nonregulated activities, not just newly authorized functions. The plans address several activities, such as the provision of inside wiring, which need not be included in interim Part 31 plans. The scope of the Pacific and Nevada plans is more comprehensive than that of most carriers' Part 31 plans, and the level of detail in both plans is commendable. Thus, commenters tended to focus on specific, technical aspects of the plans; there were no complaints that the Pacific and Nevada plans were generally lacking in detail.

60. The comments raise some valid points concerning certain aspects of the plans. For instance, we agree with DMA and Telenet that uncollectible revenues associated with nonregulated activities are likely to be greater than those attributable to regulated functions. Thus, Pacific's use of the ratio of "total nonregulated revenue to total revenue" to allocate uncollectible revenues may not be the most appropriate method of apportioning this expense. Likewise, prior to our receipt of Nevada's revisions, we shared Telenet's concern over Nevada's proposal to allocate advertising expense based on revenues, rather than using an expense-based ratio.[99] The commenters raise other legitimate, highly-specific questions as well.

61. However, we are persuaded that, overall, the Pacific and Nevada interim plans provide reasonable bases for allocating costs associated with nonregulated activities during the short timeframes the plans were in effect. We note that both companies responded to specific comments by revising their plans to address certain concerns raised by the parties, and we commend their cooperation and good faith in this matter. We acknowledge certain points raised by commenters concerning specific aspects of the plans, and were we evaluating these plans according to the criteria we have applied to permanent Part 32 manuals we might require minor revisions. However, viewed in the context of interim plans, we find no significant deficiencies regarding the Pacific and Nevada allocation procedures that require revisions at this time. We conclude that approval of the plans is warranted in light of their limited applicability.

F. ***Southwestern Bell***

1. ***The Interim Plan***

62. Southwestern Bell Telephone Company (Southwestern Bell) filed an interim cost allocation plan on June 26, 1987, in accordance with the *Southwestern Bell CPE Order*.[100] The plan specifies the cost allocation methodology Southwestern Bell proposed to apply to activities associated with enhanced services planning, research and development, and limited joint marketing of customer premises equipment. The major sections describe cost accounting concepts, incidental activities, affiliate transactions, investment and expense cost pool matrices, cost methodology for nonregulated products, and time reporting.

2. ***Comments***

63. Southwestern Bell's plan was placed on public notice.[101] The Public Service Commission of the State of Missouri (MoPSC) filed "interim" comments. MoPSC states that it has not had adequate time to review and analyze Southwestern's plan.[102] MoPSC further states that it has not prepared comments on the plan in light of the Commission's decision in the *Joint Cost Order* not to preempt the states' authority to implement different cost allocation rules for purposes of intrastate ratemaking.[103] Finally, MoPSC asserts that its lack of comment on any aspect of Southwestern's interim plan is not to be taken by any party to these proceedings as indicating the MoPSC's acquiescence or agreement to any part of Southwestern's plan for intrastate ratemaking purposes.[104] MoPSC filed no subsequent comments with respect to Southwestern's plan.

3. ***Supplemental Data***

64. Southwestern Bell filed supplemental 1987 cost data on August 9, 1988, in accordance with the *Accounting Information Order*. The data are listed separately for enhanced services planning and CPE limited joint marketing. The data reveal that expenses associated with enhanced services planning were apportioned to the nonregulated side in ten accounts in 1987. The total amount apportioned to enhanced services planning was $6,856. Of this total amount, $6,297 was directly assigned. Common expenses apportioned to enhanced services planning total $559, and involved nine accounts.

65. The data further show that costs associated with CPE limited joint marketing were apportioned to the nonregulated side in ten accounts. These costs total $12,014. Of this total amount, $897 was directly assigned. Common expenses apportioned to CPE limited joint marketing total $11,117, and involved nine accounts.

4. ***Discussion***

66. Our review of Southwestern Bell's Part 31 plan and supplemental cost data reveals no significant problems regarding allocation procedures or misallocation of costs. We note that we received no substantive comments addressing perceived, specific deficiencies in Southwestern Bell's plan. We also note the limited number of nonregulated functions and insignificant level of activity associated with the plan. No further inquiry is necessary under these circumstances. We find approval of Southwestern Bell's plan to be warranted in view of its limited applicability and *de minimis* impact on ratepayers.

G. ***U S West***

1. ***The Interim Plan***

67. U S West[105] filed an interim cost allocation plan on May 13, 1987, in accordance with the *U S West CPE Order*.[106] The plan specifies the cost allocation methodology U S West proposed to apply to activities associated with joint marketing of CPE, protocol conversion, installation and maintenance of CPE, and planning of enhanced services. The plan's major sections include an introduction, a description of activities, and a section on cost allocation methodology in matrix form. The matrix lists each Part 31 account that will be apportioned and the cost categories within each account, and describes the apportionment method to be used for each item.

2. ***Comments***

68. The U S West plan was placed on public notice.[107] AT&T, DMA, and Telenet filed comments. U S West filed reply comments.

69. AT&T objects to U S West's failure to list inside wiring services as a nonregulated activity subject to the plan, and to specify provisions in the plan for assigning inside wiring costs to nonregulated operations.[108] Telenet characterizes U S West's plan as grossly incomplete, since it deals with only four nonregulated activities and fails to identify and address other nonregulated activities in which U S West may be engaged.[109] Telenet also contends that U S West's proposed allocation methodology does not meet the requirements of the *Joint Cost Order*, and challenges the basis used to apportion certain accounts pertaining to protocol conversion.[110] Finally, both Telenet and DMA criticize what they view as U S West's over-reliance on the general allocator instead of more cost-causative methods of apportionment.[111]

70. In reply to claims that its plan is incomplete, U S West submits that a limited, interim plan need not contain the same level of detail as a comprehensive cost allocation manual.[112] U S West states that its interim plan is limited to those specific, nonregulated activities for which its companies seek waivers to offer prior to the date the permanent Part 32 manuals become effective.[113] U S West represents that other nonregulated activities, such as provision of inside wiring, would be addressed in its permanent, comprehensive Part 32 manual filed on September 1, 1987.[114] Finally, U S West maintains that the general allocator was used only when there was no appropriate cost-causative allocator that could be used to develop pools, or when the costs of acquiring data to develop a unique allocator outweighed the benefit of allocating the costs to specific pools.[115] Under these circumstances, U S West submits, the use of a general allocator is appropriate.[116]

3. ***Supplemental Data***

71. U S West filed supplemental 1987 cost data on August 9, 1988, in accordance with the *Accounting Information Order*. The data are listed separately for Mountain States, Northwestern Bell, and Pacific Northwest Bell. U S West's cost data cover all four nonregulated activities governed by its plan: joint marketing of CPE, protocol conversion, installation and maintenance of CPE, and planning of enhanced services. Unlike the data provided by other BOCs, U S West's data involve many accounts and encompass more than just activities associated with enhanced services planning and joint marketing of CPE. Thus, the total figures are not comparable to those identified for the other BOCs. Total nonregulated operating expenses reported by U S West for 1987 are $1,341,975.

4. Discussion

72. We have reviewed U S West's Part 31 plan and supplemental cost data, as well as the comments filed by interested parties, and find no significant deficiencies regarding U S West's allocation procedures. Despite the claims of the commenters, there is no need for the interim plan to include all nonregulated activities (*e.g.*, provision of inside wiring) in which U S West's operating companies engaged during 1987. Rather, U S West's plan properly covers only newly authorized nonregulated activities. Thus, comments to the contrary are based on a fundamental misconception concerning the proper scope of the Part 31 plans. However, we do share the commenters' concern regarding U S West's apparent over-reliance on the general allocator. We prefer more cost-causative methods of apportionment, particularly with respect to carriers' permanent Part 32 manuals. We note that U S West has revised its comprehensive Part 32 manual to limit the use of the general allocator. However, U S West's use of this apportionment method for these limited purposes in the context of its interim Part 31 plan does not present significant problems of cost allocation, and efforts now to develop a more accurate allocation methodology might require U S West to incur costs in excess of any additional amounts that might be allocated to nonregulated activities as a result of such efforts. Thus, we find approval of U S West's plan to be warranted in view of its limited applicability.

IV. CONCLUSION

73. In the *Joint Cost Order*, the Commission anticipated that the BOCs might wish to implement full structural relief prior to January 1, 1988. Accordingly, as a precondition to such relief, the Commission established the requirement that carriers submit comprehensive cost allocation procedures based on the Part 31 USOA. Thus, the Commission envisioned the Part 31 submissions as the first major test of its cost allocation policies and standards. For a variety of reasons, this did not occur. Carriers instead sought permission to engage only in certain limited, nonregulated activities, rather than seeking full structural relief in 1987. As a result, their Part 31 plans reflect few nonregulated activities and generally lack the detail associated with comprehensive cost allocation manuals.

74. When it became apparent that the carriers did not intend to implement full structural relief in 1987 as the Commission contemplated, we turned our attention to reviewing the carriers' permanent Part 32 manuals and the revisions to those manuals. The Part 32 manuals are comprehensive in scope. We appropriately devoted our limited resources to ensuring that the permanent manuals fully satisfy the Commission's cost allocation standards. Carriers now have in place conditionally approved, comprehensive Part 32 manuals which will govern the manner in which nonregulated costs are accounted for into the future and should protect ratepayers from bearing the costs associated with carriers' nonregulated activities.

75. Although the scope and detail of the interim Part 31 submissions do not rise to the level we have required of permanent Part 32 cost manuals, the sufficiency of the carriers' Part 31 plans must be viewed in a proper context. As the Commission recognized in the *Joint Cost Order*,[117] the level of detail in cost allocation procedures should be commensurate with the scope of the carrier's nonregulated activities. We also believe that the scope and level of detail of cost allocation procedures should be commensurate with the time they are in effect and the impact they have on ratepayers.

76. With these considerations in mind, and recognizing that our cost allocation standards have evolved over time,[118] we believe the carriers' Part 31 plans provide a reasonable basis for apportioning costs between regulated and nonregulated operations in 1987 – given the limited number and scope of the carriers' nonregulated functions, the short duration involved, the insignificant level of activity at issue, and the *de minimis* potential impact on ratepayers. We recognize that the plans are not perfect, and contain defects that we have required to be corrected in the Part 32 context. Some of these deficiencies have been identified by commenters; others have come to our attention only because of our experience gained by reviewing the comprehensive Part 32 cost manuals. However, viewed in the context of limited, interim plans, these deficiencies do not raise significant problems of cost allocation and do not warrant further proceedings at this time. Requiring carriers to correct deficiencies in their interim Part 31 plans would not benefit ratepayers due to the insignificant level of activity associated with the plans. Moreover, because of the lack of benefit to ratepayers, requiring revisions would be an imprudent use of resources for the Commission and the carriers. Thus, further proceedings are not in the public interest. Accordingly, we find the interim submissions reasonable under these circumstances. We hereby approve the carriers' Part 31 plans for 1987 and terminate these proceedings.

V. ORDERING CLAUSES

77. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that the interim Part 31 cost allocation plans filed by the BOCs in 1987 ARE APPROVED, and these proceedings are hereby terminated.

78. IT IS FURTHER ORDERED that the Petition for Evidentiary Hearings filed by the Mid-Atlantic Telephone Consumer Advocates on May 22, 1987, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Bell Atlantic, *et al.*, Accounting Plans for Nonregulated Activities Conducted During 1987, 3 FCC Rcd 3654 (1988) (*Accounting Information Order*).

[2] Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958 (1986) (*Computer III Phase I Order*), *modified on recon.*, 2 FCC Rcd 3035 (1987), *further recon.*, 3 FCC Rcd 1135 (1988), *second further recon. pending, appeals pending sub nom.* California v. FCC, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1987) and *sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also Report and Order*, 2 FCC Rcd 3072 (1987) (*Computer*

III Phase II Order), modified on recon., 3 FCC Rcd 1150 (1988), *further recon. pending, appeals pending sub nom.* California v. FCC, No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988) and *sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988).

[3] Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies, 2 FCC Rcd 143 (1987), *recon.*, 3 FCC Rcd 22 (1988).

[4] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, 2 FCC Rcd 1298 (1987) (*Joint Cost Order), modified on recon.*, 2 FCC Rcd 6283 (1987), *modified on further recon.*, 3 FCC Rcd 6701 (1988), *appeal pending sub nom.* Southwestern Bell Corp. v. FCC, No. 87-1764 (D.C. Cir.) (pet. for rev. filed Dec. 14, 1987).

[5] *See Joint Cost Order*, 2 FCC Rcd at 1328, paras. 233-235.

[6] *See, e.g.*, Bell Atlantic Petition for Acceptance of Cost Allocation Plan and for Waiver to Begin Immediate Service Development, AAD 6-1569 (filed November 26, 1986); U S West Petition for Interim Waiver to Permit Joint Marketing of Customer Premises Equipment and Network Services for Selected Large Business Customers, CC Docket No. 86-79, RM 5230 (filed February 11, 1987).

[7] *See* Bell Atlantic Telephone Companies Cost Allocation Plan for Enhanced Services Planning, 2 FCC Rcd 817 (1987) (*Enhanced Services Planning Order);* Pacific and Nevada Bell Cost Allocation Plan for Enhanced Services Planning and Development, 2 FCC Rcd 1725 (1987) (*Pacific Order);* Southwestern Bell and BellSouth, Cost Allocation Plan for Enhanced Services Research and Development, 2 FCC Rcd 3809 (1987) (*Southwestern Bell - BellSouth Order);* Ameritech and U S West, Waiver Petitions for Enhanced Services Research and Development, 2 FCC Rcd 4662 (1987) (*Ameritech - U S West Order);* Petition of U S West for Expedited Relief from and Limited Waiver of Computer II Structural Separation Requirements, 2 FCC Rcd 1581 (1987) (*U S West CPE Order);* Petition of Southwestern Bell for Expedited Relief from and Limited Waiver of Computer II Structural Separation Requirements,. 2 FCC Rcd 2437 (1987) (*Southwestern Bell CPE Order).*

[8] *See, e.g.*, Public Notice, Ameritech, BellSouth, NYNEX and Southwestern Bell File Interim Cost Allocation Manuals, 2 FCC Rcd 5575 (1987).

[9] *See, e.g.*, Ameritech Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 433 (1988) (*Ameritech Cost Manual Order).*

[10] *Accounting Information Order*, 3 FCC Rcd at 3654, para. 4.

[11] *Id.* at 3655, para. 7.

[12] *Id.* at 3654, para. 6.

[13] The Ameritech Operating Companies include Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc.

[14] *See Ameritech - U S West Order*, 2 FCC Rcd at 4662, para. 2.

[15] *See* 2 FCC Rcd 5575 (1987).

[16] *See Accounting Information Order*, 3 FCC Rcd at 3655, para. 7.

[17] The Bell Telephone Company of Pennsylvania, The Diamond State Telephone Company, the four Chesapeake and Potomac Telephone Companies, and New Jersey Bell Telephone Company.

[18] *See Enhanced Services Planning Order*, 2 FCC Rcd at 817, para. 5. *See also* Petition of the Bell Atlantic Telephone Companies for Interim Joint Marketing Relief, 2 FCC Rcd 2107 (1987).

[19] MATCA includes the Public Advocate of Delaware; the District of Columbia, Office of People's Counsel; the Maryland Office of People's Counsel; the New Jersey Department of Public Advocate, Division of Rate Counsel; the Pennsylvania Office of Consumer Advocate; the Division of Consumer Counsel of the Office of Attorney General of Virginia; and the Consumer Advocate Division, West Virginia Public Service Commission.

[20] MATCA also seeks full trial-type hearings with respect to Bell Atlantic's permanent cost allocation manual based on the Part 32 rules. This is not the appropriate proceeding to address procedures for review of the Part 32 cost manuals.

[21] The *Nader* decision involved the Commission's authority to prescribe an authorized rate of return for carriers.

[22] MATCA Petition at 5-6.

[23] *See* 5 U.S.C. §§ 553(c), 554(a), 556, and 557.

[24] *See* U.S. v. Florida East Coast Railway Co., 410 U.S. 224 (1973) (trial-type hearings required when statute contains the phrase "on the record after opportunity for an agency hearing").

[25] MATCA Petition at 6-7 (citing Seacoast Anti-pollution League v. Costle, 592 F.2d 872, 875-78 (1st Cir. 1978); Marathon Oil Co. v. EPA, 564 F.2d 1253, 1260-64 (9th Cir. 1977).

[26] MATCA Petition at 8.

[27] *Id.* at 8-9.

[28] Bell Atlantic Opposition at 2.

[29] *Id.* at 2-3.

[30] *Id.* at 3-4.

[31] MATCA Reply at 3-5.

[32] *Id.* at 5-6.

[33] *Id.* at 6-7.

[34] MATCA's reliance on Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975), is misplaced. In upholding the Commission's authority to prescribe a carrier's authorized rate of return, the *Nader* Court considered and rejected the argument that the Commission's prescription of a rate of return was the equivalent of a prescription of rates. 520 F.2d at 198-201. We find MATCA's attempt to equate Commission approval of cost allocation plans with the prescription of rates even less persuasive than the failed attempt in the *Nader* case to equate the prescription of a rate of return with the prescription of rates. Unlike in *Nader*, in which the court specifically found a *prescription* (of the authorized rate of return), 520 F.2d at 201, there is no prescription of anything when we approve a carrier's proposed cost allocation plan. We simply review a carrier's cost allocation procedures for sufficiency in relation to the standards of the *Joint Cost Order*.

[35] Bell Atlantic Opposition at 3-4.

[36] *See also* Western Union Telegraph Co. v. FCC, 665 F.2d 1126, 1151 (D.C. Cir. 1981) ("It is settled law that FCC policy decisions impacting, but not setting, rates may, when appropriate, be made [under Section 205(a)] in an informal Rule Making rather than in an adjudicatory ratemaking proceeding."); Bell Telephone Co. of Pennsylvania v. FCC, 503 F.2d 1250, 1263-68 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975) (notice and comment procedures held adequate to satisfy the "opportunity for hearing" requirement in § 201(a) of Communications Act); RCA Global Communications, Inc. v. FCC, 559 F.2d 881, 885-87 (2d Cir. 1977) ("full hearing" requirement in § 222(e)(3) of Communications Act could be satisfied by notice and comment procedures).

[37] *See* Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, 435 U.S. 519, 543 (1978) ("administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties").

[38] MATCA Petition at 6.

[39] *See* 2 FCC Rcd 2476 (1987).

[40] Telenet Comments at 4.

[41] MPC Comments at 2-5.

[42] *Id.* at 5-7.

[43] AIFAC Comments at 3-5.

[44] MPC Comments at 7-8.

[45] *Id.* at 8-9.

[46] *Id.* at 9-10.

[47] *Id.* at 10.

[48] AIFAC Comments at 3-4.

[49] *Id.* at 4.

[50] *Id.* at 4-5. *See also* MPC Comments at 7.

[51] AIFAC Comments at 5-6. *See also* MPC Comments at 11.

[52] AIFAC Comments at 6-7.

[53] Bell Atlantic Reply Comments at 1-2.

[54] *See id.* at 3-6 (disputing four specific objections raised by MPC).

[55] *See id.* at 2-3 (asserting that AIFAC's call for greater detail in specific areas is "unnecessary and inappropriate" due to the limited scope of the plan).

[56] *See Enhanced Services Planning Order*, 2 FCC Rcd at 817, para. 5.

[57] *See Southwestern Bell - BellSouth Order*, 2 FCC Rcd at 3809, para. 3 and n. 7.

[58] *See* 2 FCC Rcd 2286 (1987).

[59] MCI Comments at 2.

[60] *Id.*

[61] Ad Hoc Comments at 3.

[62] *Id.*

[63] *Id.* at n. 1.

[64] *Id.* at 4.

[65] BellSouth Reply Comments at 3.

[66] *Id. See also id.* at n. 4.

[67] *Id.* at 3-4.

[68] *Id.* at 4, n. 5.

[69] *Id.* at 4-5.

[70] *See* 2 FCC Rcd 5575 (1987).

[71] AT&T Comments at 1.

[72] *Id.* at 1-2.

[73] *Id.* at 2.

[74] BellSouth Reply Comments at 1.

[75] *Id.* at 2-3.

[76] The NYNEX Telephone Companies include New York Telephone Company and New England Telephone and Telegraph Company.

[77] *See Joint Cost Order*, 2 FCC Rcd at 1328, para. 235. *See also* NYNEX Waiver Petition for Enhanced Services Research and Development, 2 FCC Rcd 6559 (1987) *(NYNEX Waiver Order)*.

[78] *See* 2 FCC Rcd 5575 (1987).

[79] *See Pacific Order*, 2 FCC Rcd at 1725, para. 4.

[80] *See* 2 FCC Rcd 2997 (1987).

[81] *See, e.g.*, AT&T Comments at 1-2; Telenet Comments at 2.

[82] AT&T Comments at 2-3.

[83] *Id.* at 3-4.

[84] DMA Comments at 3-4; Telenet Comments at 3-4.

[85] Telenet Comments at 4.

[86] DMA Comments at 4.

[87] Telenet Comments at 2-3.

[88] *Id.* at 5-6.

[89] *Id.* at 6.

[90] *Id.* at 7.

[91] *Id.*

[92] *Id.* at 8-9.

[93] *Id.* at 8.

[94] *Id.*

[95] Pacific Reply Comments at 1-2; Nevada Reply Comments at 1.

[96] *See, e.g.*, Pacific Reply Comments at 9 (disputing Telenet's comments concerning Pacific's allocation of fringe benefits); Nevada Reply Comments at 3 (disputing Telenet's contention that Nevada's time reporting procedures are deficient).

[97] *See, e.g.*, Pacific Reply Comments at 8-9 (offering revisions to Pacific's interim plan to provide more detail about the procedures Pacific will use to report employee time); Nevada Reply Comments at 4 (offering revisions to Nevada's interim plan to reflect the fact that all nonregulated advertising expenses will be identified and tracked by product).

[98] In view of our decision herein, we need not address the issue of confidentiality at this time.

[99] We note that Nevada submitted those revisions to its plan in response to Telenet's comments concerning the plan's treatment of advertising expenses. The revised plan reflects the fact that all nonregulated advertising expenses will be identified and tracked by product. Nevada Reply Comments at 4 & Appendix B, revised p. 21. *See* n. 97, *supra*. This revision adequately addresses our concern in the context of Nevada's Part 31 plan.

[100] *See Southwestern Bell CPE Order*, 2 FCC Rcd at 2437, para. 8. *See also Southwestern Bell - BellSouth Order*, 2 FCC Rcd 3809.

[101] *See* 2 FCC Rcd 5575 (1987).

[102] MoPSC Comments at 2.

[103] *Id.* at 3. *See Joint Cost Order*, 2 FCC Rcd at 1310, paras. 88-93.

[104] MoPSC Comments at 3.

[105] The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company.

[106] *See U S West CPE Order*, 2 FCC Rcd at 1581, para. 8.

[107] *See* 2 FCC Rcd 2998 (1987).

[108] AT&T Comments at 4.

[109] Telenet Comments at 2.

[110] *Id.* at 3-5.

[111] *Id.* at 3; DMA Comments at 3-4.

[112] U S West Reply Comments at 2.

[113] *Id.* at 3.

[114] *Id.* at 2.

[115] *Id.* at 2, 3.

[116] *Id.* at 3.

[117] 2 FCC Rcd at 1319, para. 164 ("The scope and nature of nonregulated activities that the carriers may ultimately undertake will determine the number of cost categories that an acceptable manual would require . . . A very coarse categorization

of costs, which would be acceptable for a carrier providing only a very limited amount of nonregulated service, would be unacceptably imprecise for allocating costs for a carrier extensively engaged in nonregulated activities."). *See also Ameritech Cost Manual Order,* 3 FCC Rcd at 434, para. 6 (level of detail reflected in selection of cost categories should be governed by extent of carrier's involvement in nonregulated activites).

[118] *See* para. 2, *supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY

Comparably Efficient Interconnection
Plan for FTS2000 Enhanced Services

MEMORANDUM OPINION AND ORDER

Adopted: June 6, 1989; Released: June 15, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On January 24, 1989, pursuant to the requirements of the *Computer III* proceeding,[1] the American Telephone and Telegraph Company (AT&T) filed a Comparably Efficient Interconnection (CEI) Plan (the Plan) for the provision of enhanced services to be offered to users of the FTS2000 Network A. Two parties filed comments: MCI Telecommunications Corporation (MCI) and Tymnet-McDonnell Douglas Network Systems Company (Tymnet). AT&T filed reply comments. Pursuant to our delegated authority, we approve the Plan.

2. AT&T will offer two enhanced services--Agency Recorded Message Announcements (ARMA) and protocol conversion--to the General Services Administration (GSA) pursuant to the FTS2000 Network A contract, which GSA awarded to AT&T on December 7, 1988. AT&T describes FTS2000 as "a custom-designed integrated terrestrial and satellite network combining various voice, data, and video transmission capabilities, as well as network engineering, billing, and management for use throughout the United States, Puerto Rico, Guam, and the U.S. Virgin Islands."[2]

3. According to AT&T, GSA has divided the total FTS2000 system into two segments, Networks A and B. AT&T is the prime contractor for Network A, which is expected to handle 60% of the traffic, and US Sprint is the prime contractor for Network B, which will handle the remaining 40%. Individual government agencies will be assigned to either one or the other network. The GSA's Request for Proposal (RFP) specified six basic and three enhanced services to be provided to the government.[3] AT&T claims that its CEI plan for the offering of the two enhanced services that will be provided on a collocated basis (ARMA and protocol conversion) "fully satisfies the Commission's CEI requirements and should be approved."[4] In its Plan, AT&T separately describes the manner in which it intends to comply with the CEI parameter requirements in the provision of ARMA and protocol conversion.

II. ARMA SERVICE

A. *Service Description*

4. According to AT&T, "FTS2000 ARMA provides the digital capability to record, store, and play back messages or announcements in the FTS2000 network."[5] Users can access these stored, audiotext-like messages from on-net and off-net locations. The ARMA hardware will be collocated with basic service equipment at each Service Node of the FTS2000 network. Messages or announcements for ARMA will be entered, changed, or updated through a workstation centrally located in the FTS2000 Customer Service Office via a dial-up data connection.[6]

B. *CEI Arrangements*

5. The underlying basic service that will provide access to ARMA will be the FTS2000 Switched Voice service. AT&T will incur full tariffed rates for ARMA interconnection under the FTS2000 Tariff F.C.C. No. 16.[7] According to AT&T, "CEI will be provided pursuant to the terms and conditions of FTS2000 Service, as filed in Tariff F.C.C. No. 16. CEI will be available without restriction to any other vendor that is authorized to provide enhanced service applications to the Government using the FTS2000 network."[8]

C. *CEI Parameters*

1. *Positions of the Parties*

6. Parties either made no comments on, raised no substantive objections to, or only repeated or referenced arguments made and resolved in other proceedings regarding AT&T's treatment of the CEI parameters for ARMA.[9] However, MCI and Tymnet express a number of more general concerns that, while focused on AT&T's ARMA proposals, also apply to protocol processing.

7. MCI claims that "AT&T's proposal fails to comply with Commission policy and requirements for CEI plans" because AT&T's enhanced service operations will be using FTS2000 basic services at Tariff F.C.C. No. 16 rates, and not under the terms and conditions contained in "public" tariffs.[10] Since AT&T will offer Tariff F.C.C. No. 16 rates only to those ESPs authorized to use the FTS2000 network, MCI claims that those ESPs that are not "approved providers" for FTS2000 users would be required to use other AT&T network offerings, at presumably higher public tariff rates, in providing enhanced services to non-FTS customers.[11] MCI concludes, "This gives AT&T an advantage in developing enhanced services and precludes competing enhanced service providers from accessing and using AT&T's basic network facilities on an equivalent, nondiscriminatory basis."[12] MCI further argues that the practice of charging different rates to ESPs that are not authorized to use the FTS2000 network "is discriminatory on its face and is inconsistent with the Commission's CEI requirements."[13]

8. As a remedy, MCI proposes that AT&T be required to offer all unaffiliated ESPs equivalent access to its basic network facilities and services under the same terms and conditions as AT&T obtains when it utilizes such facilities and services in providing its own ARMA services.[14] MCI claims that the fact that AT&T is proposing to offer enhanced services under contract to a single customer "is simply irrelevant to its obligation to comply with this Commission's CEI rules."[15]

9. MCI also claims that AT&T could provide similar enhanced services to other customers under a customer-specific communications arrangement and that AT&T might not allow other ESPs to use the AT&T network in the same way, or under the same terms and conditions, if competing ESPs were developing similar enhanced services for other potential customers.[16] MCI concludes that the Plan violates the essential premise of *Computer III* and gives AT&T an advantage over competing ESPs, who are not allowed to use the AT&T network under the same terms and conditions as the AT&T enhanced service affiliate.[17]

10. AT&T challenges MCI's contention that the restriction on interconnection at Tariff F.C.C. No. 16 rates to authorized users constitutes discrimination by AT&T. This mischaracterizes AT&T's role in providing FTS network services, AT&T states, because "[t]he determination of who is authorized to use or interconnect with FTS2000 is made by GSA, not AT&T. Thus AT&T cannot discriminate or preclude access to FTS2000 by any other enhanced services vendor . . . [that is permitted by GSA to interconnect with FTS2000]."[18]

11. AT&T also claims that it derives no unfair competitive advantages as a result of the conditions of its Plan. AT&T states that under the conditions of the FTS2000 RFP, AT&T, as the successful bidder, will be the sole provider of ARMA and protocol processing. If GSA, through the competitive bidding process, were to authorize other vendors to provide additional enhanced services, such a vendor "would receive FTS2000 service on the same terms and conditions as AT&T."[19]

12. Whenever AT&T would provide enhanced services in the non-FTS2000, or general, marketplace, AT&T states that if it were to provide a specific enhanced service, it could not provide such a service using FTS2000 facilities, but would, instead use "different underlying basic services, which would be made available to other vendors under a different CEI plan."[20]

13. AT&T also addresses claims that FTS2000 rates, terms, and conditions must be made available to ESPs for the non-FTS2000 enhanced service market. AT&T argues that "nothing in the Commission's CEI requirements suggests that a lawful tariff must be made available to the entire public for CEI purposes."[21] AT&T notes that although the *Phase I Order* states that CEI should be "generally available", that statement is within the context of whether CEI should be made available to users other than ESPs.[22]

14. Tymnet states that AT&T has not publicly disclosed its Tariff FCC No. 16 rates and that such information is necessary to "provide a basis for comparison with the rates applicable to the basic services that will be available to competing vendors of federally procured enhanced services."[23]

2. ***Discussion***

15. MCI and AT&T agree that ESP access to FTS2000 basic services is restricted to those ESPs that are authorized under the terms of a GSA contract to provide enhanced services to the FTS2000 user community. MCI contends that this restriction on access to the basic services underlying AT&T's enhanced offerings renders AT&T's Plan discriminatory. We disagree.

16. Under the terms of the GSA contract, AT&T is not authorized to determine which ESPs may interconnect with Network A for the provision of enhanced services. That decision can only be made by GSA. Our nondiscrimination requirements for CEI apply to carrier provision of basic services, not to end user selection of ESPs. At the present time, AT&T is the sole ESP authorized by GSA to serve FTS2000 Network A users; and it is authorized to provide only three enhanced services, two of which (ARMA and protocol conversion) it intends to provide on a collocated basis pursuant to the Plan. Should the GSA authorize other ESPs to provide enhanced services, AT&T states, as the Network A system contractor, that it will offer such entities non-discriminatory access to underlying FTS2000 services under the same terms and conditions that it uses such services for its own enhanced service operations. We find that by offering to provide non-discriminatory access to the FTS basic network for ESPs selected by the customer-- *i.e.*, GSA-- AT&T meets the CEI requirement that basic services underlying AT&T's enhanced offerings be available to competing ESPs.

17. MCI also argues that AT&T's CEI proposal is discriminatory because AT&T intends to charge its enhanced service operations for underlying FTS2000 basic service under the terms and conditions of Tariff F.C.C. No. 16, which will put other ESPs at a disadvantage in offering competing enhanced services both to GSA and to the general public. While MCI questions the general propriety of the FTS2000 tariff *vis - a - vis* AT&T tariffs for other network offerings, we do not consider such issues in this limited CEI proceeding. AT&T has stated that: (a) in the FTS2000 marketplace, it will offer authorized ESPs the use of underlying basic services through Tariff F.C.C. No. 16; and (b) when competing with other ESPs in the general marketplace, it will not be using FTS2000 facilities, and it will provide ESPs with whatever basic, underlying facilities it uses under a different CEI plan at applicable tariffed rates.

18. MCI has not explained how this practice will disadvantage ESP competitors in either the FTS or general enhanced services marketplace. To the contrary, given the meaning of "authorized users" in the FTS context, we find that AT&T has fulfilled our requirements that other ESPs be charged the same rates for underlying basic services that AT&T charges its own enhanced operations for its ARMA and protocol conversion services. When AT&T proposes to offer enhanced services to the general marketplace, we shall analyze AT&T's CEI plans for those services to ensure compliance with our rules. This is the course we have followed to date for other AT&T enhanced service offerings.[24]

19. Tymnet asks that we require AT&T to make a public disclosure of the terms and conditions of Tariff F.C.C. No. 16, claiming that such information is necessary for the proper evaluation of the Plan. This objection is now moot, since AT&T publicly disclosed the FTS2000 tariff on March 30, 1989, pursuant to a Bureau order.[25]

III. PROTOCOL CONVERSION SERVICE

A. ***Service Description***

20. AT&T will provide a Packet Assembler/Disassembler (PAD) capability to be used in conjunction with FTS2000 Packet Switched Service (one of the

basic services be provided under the FTS2000 contract). The following CPE and host protocols will be supported: (i) asynchronous ASCII conforming to FIPS PUB 1,2,3-1, and 7 standards; (ii) IBM 2780, 3780, and 3720 synchronous BSC; and (iii) IBM 3270 SNA/SDLC synchronous protocol.[26]

B. *CEI Arrangements*

21. FTS2000 end users will access the Packet Switched service via on-net and off-net dial-up access at asynchronous speeds of 300, 1200, and 2400 b/s and at synchronous speeds of of 4.8 Kb/s. For synchronous data, dedicated access to Packet Switched Service will be provided via voice grade analog lines (for access at 4.8 and 9.6 Kb/s), and digital lines (for access at 9.6 and 56 Kb/s).[27]

C. *CEI Parameters*

22. AT&T states that the Commission has specified that, in the case of protocol conversion, AT&T need only comply with two CEI requirements: (a) it must provide nondiscriminatory access to underlying digital transmission services and facilities; and (b) it must take such services and facilities at the standard tariffed rates it charges to others.[28]

23. AT&T claims that its nondiscriminatory offering of FTS2000 Packet Switched Service to authorized ESPs, under Tariff F.C.C. No. 16, fulfills the first condition. It further states that its protocol processing operation will take FTS2000 Packet Switched service pursuant to the Tariff F.C.C. No.16 rates. AT&T concludes, "The CEI requirements for AT&T protocol conversion services are thus satisfied."[29]

1. *Positions of the Parties*

24. Tymnet argues that AT&T must comply with all nine CEI parameters in providing protocol conversion service. Tymnet acknowledges that AT&T "has accurately reiterated the [two] CEI standards, broadly phrased [in the *Phase II Order*], that are applicable to AT&T's provision of protocol conversion services."[30] Tymnet claims, however, that AT&T's assurances that it will meet these standards, absent further support, are insufficient, and asks that AT&T be required to demonstrate precisely and in more detail how it will meet these two standards.[31]

25. Tymnet further claims that the Commission "has nowhere indicated that the 'slight difference' it has authorized in the application of the CEI rules to AT&T's protocol conversion services implies that it has relaxed or eliminated all of the other CEI parameters as well."[32] Tymnet acknowledges that, in approving AT&T's CEI plan for Codec Conversion Service, we did not require AT&T's explication of its compliance with the nine CEI parameters. Tymnet claims, however, that the *Codec Order* [33] does not apply to the FTS2000 case because that decision was based on the finding that for Codec Conversion Service, "'discrimination . . . is not of apparent concern.'"[34] In particular, Tymnet is concerned that the Plan does not adequately treat the following parameters: end-user access and minimization of transport costs.[35]

26. Tymnet also says that AT&T may use tariffed services other than Packet Switched Service, such as digital private line, in the provision of protocol conversion. Tymnet thus challenges the adequacy of AT&T's CEI undertakings for protocol conversion, which are stated in the Plan in terms of access to, and rates for, Packet Switched Service. Tymnet contends that if other services are used, AT&T should demonstrate that these, too, would be made available to competitors pursuant to the same terms and conditions that would be applied to AT&T.[36]

27. AT&T replies to Tymnet's arguments that it should be required to describe fully its compliance with all nine CEI parameters as set forth in the *Phase I Order*, rather than under the two parameter requirement set forth in para. 63 of the *Phase II Order*, by stating that "AT&T's CEI Plan for Codec Conversion Service relied upon the same two-part test AT&T relies upon here [and that] the Bureau rejected substantially similar arguments by intervenors in that case."[37]

28. AT&T denies that it may offer protocol conversion by using other non-packet-switched digital services, such as FTS2000 Switched Data and Dedicated Transmission Service, AT&T states that its protocol conversion service will use Packet Switching Services exclusively. Thus, it contends, it is unnecessary to make any additional showings with respect to other basic services because, "[a]ll charges for access and transport associated with protocol conversion are recovered under the rate schedule for the FTS2000 Packet Switched Service ('PSS') . . . . [and that this] rate schedule provides separately stated rates for PSS access and transport."[38] AT&T further specifies the options available to end users for accessing PSS.[39] Since the access and transport functions are included in the PSS tariff, AT&T further states that that this circumstance moots Tymnet's claim that AT&T has not addressed the "minimization of transport costs" parameter.

2. *Discussion*

29. Tymnet claims that the *Phase II Order* cannot be construed to limit AT&T's CEI parameter requirements for protocol conversion services to the two parameters cited therein, and that the findings of the *Codec Order*, which upheld the two-parameter requirement of the *Phase II Order*, cannot be extrapolated to the provision of protocol conversion service in conjunction with FTS2000. We find Tymnet's claims to be without merit. We fully considered such arguments in the *Codec Order*, and Tymnet has not convinced us that the circumstances related to the provision of protocol conversion in conjunction with FTS2000 differ from those associated with the provision of protocol conversion with Codec service.

30. Tymnet requests that AT&T demonstrate that AT&T is not using other underlying digital transport services, in addition to Packet Switched Service, in support of its protocol conversion service. In its reply, AT&T states that it will be using Packet Switched Service exclusively for protocol conversion and that all underlying transport and access services are subsumed in the tariff for Packet Switched Service; AT&T then clarifies the access options available for Packet Switched Service. The AT&T statement is a satisfactory reply to Tymnet's concerns.

IV. ORDERING CLAUSE

31. IT IS HEREBY ORDERED, that pursuant to Sections 1, 4(i) and (j), 201, 202, 203, 205, 218, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154 (i) and (j), 201, 202, 203, 205, 218, and 405, and 5 U.S.C. § 553, and authority delegated thereunder

pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, AT&T's CEI Plan for FTS2000 enhanced services IS APPROVED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC 3035 (1987), *aff'd on further reconsideration*, 3 FCC Rcd 1135 (1988), *second further reconsideration pending, appeals pending sub nom. California v. FCC*, No. 87-7230 (9th Cir.) and *Illinois Bell v. FCC*, No. 88-1364 (D.C. Cir.). *See also Report and Order*, 2 FCC Rcd 3072 (1987), *modified on reconsideration*, 3 FCC Rcd 1150 (1988), *further reconsideration pending, appeals pending sub nom. California v. FCC*, No. 88-7183 (9th Cir.) and *Illinois Bell v. FCC*, No. 88-1364 (D.C. Cir.).

[2] Plan at 2.

[3] The six basic services, which will be provided to GSA pursuant to AT&T Tariff F.C.C. No. 16, Competitively Bid Governmental Services, are: Switched Voice; Switched Data; Switched Digital Integrated; Video Transmission; Packet Switched; and Dedicated Transmission. Pursuant to the RFP, AT&T will provide three enhanced services in conjunction with FTS2000 Network A. ARMA and protocol conversion will be provided on a collocated basis. Electronic Mail Service will be provided on a non-collocated basis, pursuant to AT&T's ONA Plan and the *AT & T ONA Plan Order*. Plan at 3-4 *citing, Filing and Review of Open Network Architecture Plans*, CC Docket No. 88-2, Phase II, Memorandum Opinion and Order at paras. 28-45 (*See* 4 FCC Rcd 2449 (1989)).

[4] Plan at (i).

[5] *Id.* at 5.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 13.

[9] The nine CEI parameters are discussed in the *Phase I Order*, 104 FCC 2d at 1039, paras. 154-166.

[10] MCI Comments at 1.

[11] *Id.* at 3-4. Tymnet is concerned that AT&T has not clarified the process by which other ESPs will be "authorized" to provide enhanced services to FTS2000.

[12] *Id.* at 4.

[13] *Id.* at 7.

[14] *Id.* at 8. MCI makes this argument for protocol conversion as well.

[15] *Id.*

[16] *Id.* at 9.

[17] *Id.*

[18] AT&T Reply at 5. AT&T further states that a "user" is defined as "a person or legal entity authorized by a Customer [e.g., GSA] to communicate over, or be connected to, the Customer's service." *Id.*, n. ***, citing AT&T Tariff F.C.C. No. 16, Para. 2.1.25.

[19] AT&T Reply at 7.

[20] *Id.* at 8.

[21] *Id.* , n.*.

[22] *Id., citing Phase I Order*, 104 FCC 2d at 1042, para. 165.

[23] Tymnet Comments at 5, citing *Phase II Order*, 2 FCC Rcd at 3081, para. 63. Tymnet further argues that parties should be allowed "to supplement their comments with respect to this particular aspect of AT&T's CEI Plan after they have had an opportunity to review the relevant FTS2000 rates." Tymnet Comments at 7.

[24] *See* In the Matter of American Telephone and Telegraph Company Comparably Efficient Interconnection Plan for Codec Conversion Service, *Memorandum Opinion and Order*, 3 FCC Rcd 4683 (Comm. Car. Bur. 1988), *(Codec Order);* In the Matter of AT&T Plan for Transaction Services, *Memorandum Opinion and Order*, 3 FCC Rcd 2702 (Comm. Car. Bur. 1988), *app. for review denied*, FCC 89-161, (adopted May 17, 1989).

[25] *See* AT&T Communications Tariff F.C.C. No. 16, Transmittal No. 1493, Memorandum Opinion and Order, DA 89-245, Rel. Feb. 28, 1989. Since parties have commented on the FTS2000 filing in tariff proceedings, we see no need to request supplemental pleadings on that tariff in this proceeding. Neither Tymnet nor any other party has sought leave to file such supplemental pleadings.

[26] Plan at 16.

[27] *Id.*

[28] *Id.* at 17, *citing Phase II Order*, 2 FCC Rcd at 3081, para. 63.

[29] *Id.* at 18.

[30] Tymnet Comments at 8.

[31] *Id.* at 8-9.

[32] *Id.* at 10.

[33] *See supra* note 24.

[34] Tymnet Comments at 10, n. 18, *citing Codec Order* at para. 21.

[35] As noted above, Tymnet is also concerned that AT&T has not clarified the process by which other ESPs will be authorized to provide enhanced services to FTS2000. *See supra* note 13.

[36] *Id.* at 13.

[37] AT&T Reply at 10-11, *citing Codec Order* at paras. 10, 11. With regard to Tymnet's claim that it is not clear who will authorize other ESPs to offer enhanced services to FTS2000 users, and what the authorization criteria will be, AT&T reiterates that GSA and not AT&T will make that determination, and as a result, "AT&T cannot discriminate in the provision of CEI for protocol conversion." *Id.* at 11.

[38] *Id.* at 12.

[39] *Id.* at 12 n*.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 6, 1989

NOTICE OF CHANGE OF RELEASE DATE

Due to yesterday's power outage, the FCC was closed Monday June 5, 1989. All items dated and scheduled to be released on June 5 by the FCC's Office of Public Affairs, News Media Division, were actually released on Tuesday, June 6.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-526

In the Matter of

Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License — RM-6122

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 26, 1989; Released: June 15, 1989

By the Commission: Commissioner Quello dissenting and issuing a separate statement.

1. The Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 6890 (1988), proposing a procedure whereby licensees and permittees of FM and television broadcast authorizations could request a new community of license in rule making proceedings to amend the FM and television tables of allotments without subjecting the licensee or permittee to the risk of losing its authorization to competing applicants. The Commission issued the *Notice* in response to a petition for rule making filed by Christian Voice of Central Ohio (petitioner), licensee of Station WCVZ(FM), Channel 224A, Zanesville, Ohio.

BACKGROUND

2. The Commission currently regards any petition to amend the FM or television tables of allotments that would change an allotment's community of license as an event triggering an opportunity for all interested parties to file applications for the new allotment, regardless of whether the allotment is occupied.[1] Upon petitioning the Commission to change the community of license of WCVZ(FM) in order to accommodate an upgrade of the station, petitioner first learned of the existence of this policy. Because it believed that the public interest may be served by a reexamination of this policy, petitioner suggested that the Commission amend its rules to permit FM licensees to upgrade facilities on higher class adjacent or co-channel frequencies, without entertaining competing expressions of interest or competing applications for the amended allotment, even if the upgrade would require modification of the licensee's community of license. Petitioner, citing the Commission's actions in *Modification of FM Broadcast Licenses to Higher Class Co - Channel or Adjacent Channels*,[2] claims that the Commission has rejected the rationale for its present policy.

3. The *Notice* proposed to amend Section 1.420 of the Commission's rules to provide a procedure whereby a licensee or permittee may petition the Commission for an amendment to the FM and television tables, and modification of its license accordingly, without placing its existing authorization at risk, regardless of whether that change involves a change in transmitter site, a change in class of channel, or both. The *Notice* requested comment on the public interest benefits of the proposal, as well as the initial view that the procedure would be available only if the new community would serve the Commission's allotment priorities and policies better than the old community, and if the new allotment is mutually exclusive with the existing allotment. The *Notice* also requested comments on the Commission's initial views that the procedure should be applicable only to adjacent channel upgrades and to intraband noncommercial and commercial channel exchanges. Twenty parties submitted comments in response to the *Notice*, and six parties submitted reply comments.[3]

SUMMARY OF COMMENTS

4. The comments filed in response to the *Notice* were predominantly favorable, with nineteen of the twenty respondents approving some form of the proposal. While only one commenter is in total opposition to the proposal, other commenters oppose several of the tentative conclusions stated in the *Notice*. Generally, these parties question the appropriateness of the proposed procedure in relation to television allotments, or, on the other hand, oppose limiting use of the procedure to instances in which an allotment to a new community would better serve the Commission's allotment priorities and policies. Several parties agree with the Commission's determination that the proposal should be limited to instances in which the proposed allotment is mutually exclusive with the present allotment. The National Association of Broadcasters ("NAB") views mutual exclusivity, in conjunction with application of the allotment criteria, as necessary limitations. Citadel Communications Company ("Citadel") and several others support the tentative conclusion that the procedure not be used for nonadjacent upgrades. Many parties discuss the *Ashbacker* doctrine[4] and related policies. The comments are summarized below.

5. *Ashbacker Doctrine*. Great American Television and Radio Company ("Great American") objects to the proposed procedure, stating that it is contrary to the requirements of *Ashbacker*. Great American argues that the allotment of a channel to a new community is an event triggering the acceptance of competing proposals, as potential competitors for the new allotment may be different from those who applied for the existing allotment. Comparing the instant proceeding to an earlier Commission proposal to permit interband channel exchanges,[5] Great American submits with its comments a joint memorandum of law originally submitted in that proceeding which details the history and requirements of *Ashbacker*. This memorandum states that *Ashbacker* requires the Commission, whenever a channel is made available for use in a community for the first time, to open the channel to applications by all interested parties so that the Commission can determine the most qualified applicant for the channel.

6. Many commenters maintain that *Ashbacker* does not require the Commission to accept competing applications when a proposed new use by the licensee is mutually exclusive with the existing use. CERM Broadcasting Corporation and Crow River Broadcasting ("CERM/Crow River") cite the Commission's actions in *FM Adjacent and*

Co - Channel Upgrades and *Noncommercial Educational Reservations* in support of this proposition. Maines and Premier distinguish the proposal from *Riverside and Santa Ana*, as many public interest benefits would flow from the instant proposal. NAB, referencing *United States v. Storer Broadcasting Company*,[6] states that the Commission need not require comparative hearings when the Commission establishes as a general policy that, in certain categories of cases, allowing competing applications does not serve the public interest.

7. Five reply comments directly address the *Ashbacker* arguments made by Great American. The reply commenters, referencing *FM Adjacent and Co - Channel Upgrades*, maintain that *Ashbacker* does not preclude the proposed procedure. Maines Broadcasting ("Maines") and Premier Broadcasting Group ("Premier") argue that *Ashbacker* does not determine the threshhold circumstances under which the Commission must accept competing applications for an allotment, as *Ashbacker* is directly applicable only to cases in which an unoccupied channel is available for general application, and, under other circumstances, the Commission's determination by rule making of eligibility to apply for a channel is controlling.

8. *Public Interest Benefits*. Many of the supporting comments agree with the description of the public interest benefits in the *Notice*. Commenters note that the present policy deters beneficial upgrades that would require a change in the community of license. Several commenters point out that the new procedure would enhance a licensee's flexibility in choosing and modifying facilities. Many commenters note that the proposal is consistent with earlier Commission actions to modify policies that frustrate the advancement of proposals that would serve the public interest. Citadel argues that the Commission's current policy discourages licensees from changing transmitter sites to newer, larger population centers "because of the need to continue to provide city-grade coverage to a community which may no longer merit local service." Others note that the public interest benefits surrounding this proposal are similar to those discussed in *FM Adjacent and Co - Channel Upgrades*. Maines and Premier state that the proposal could result in the revitalization of stations allotted to communities with an inadequate economic or population base by permitting a station to change its community of license to a city better able to support a station. Tri-Valley Broadcasting Company believes the proposal would allow a licensee to look at growth patterns and decide if a greater population could be better served by a change in the community of license.

9. Cox Enterprises ("Cox"), while not opposed to the proposal, expresses concern that the procedure could facilitate abuses of process by licensees, because a licensee might employ the procedure to abandon an original community of license and move to another community in order to serve a larger market. Cox fears that such a move could harm the original community of license without offering any tangible benefits to the new community.

10. Meredith Corporation ("Meredith") argues that there is no need to apply the proposed procedure to television stations. Meredith notes that, unlike FM service, there is no station classification system in the television service, so there is no need for a television station to change its community of license to obtain a higher classification.

11. Meredith also argues that a television station could use the proposed procedure to circumvent the Commission's programming exclusivity rules. Meredith claims that a station licensed to an urban community could move to a smaller community outside of the area covered by the rules, reorient its antenna or increase its power, and continue to serve the urban community, thereby avoiding the Commission's territorial exclusivity rule.[7] This situation, claims Meredith, would result in less diversity of programming as the station changing its community of license would be free to purchase duplicative programming. NAB states that there are additional issues related to television that the Commission should consider, and suggests that the Commission examine the effect of the proposal with respect to programming exclusivity, cable television signal carriage, and other spectrum related proceedings.

12. The concerns raised by Meredith were addressed by two reply commenters. Citadel maintains that a licensee would not move to a suburban community to broadcast duplicative syndicated material. Pappas argues that it is more likely that suburban broadcasters would want to move to urban areas, thereby bringing within the scope of their programming exclusivity rights a greater number of stations, and thereby increasing the diversity of programming.

13. *The Commission's Allotment Priorities and Policies*. NAB states in both its initial and reply comments that the proposed procedure should be used only if an allotment to the new community would further the policy goals of Section 307(b) and the allotment priorities and policies.[8] NAB expresses concern over the potential of this proceeding to undermine the mandate of localism found in Section 307(b). NAB argues that the allotment criteria now employed reflect Section 307(b)'s objective of ensuring that each local community has a broadcast voice. Failure to consider the allotment priorities, claims NAB, might result in removal of the only voice present in a community. Meredith states that FM licensees should be required to show that the new community of license is preferable under Section 307(b), and is necessary to obtain a higher class allotment, in order to utilize the procedure.

14. On the other hand, a number of commenters in both initial and reply comments oppose the Commission's tentative conclusion that the proposal should only be utilized when the new community serves the Commission's FM allotment priorities and policies. With respect to the FM service, commenters maintain that a strict application of the FM allotment priorities would limit a station's flexibility in changing a community of license, even if there are strong public interest benefits in favor of the change. CERM/Crow River notes that the extension of the procedure to communities not necessarily preferable under the priorities, but offering public interest benefits, would reflect the regional nature of broadcasting and the realities of the marketplace while promoting competition among stations in a market. Press Broadcasting Company ("Press") notes that higher class FM stations and stations in congested areas serve a larger geographic community than the community of license. Press notes that a strict adherence to the allotment criteria ignores the reality that a small suburban station will attempt to serve the entire urban area. Maines and Premier note that a flexible approach to the allotment criteria would allow the Commission to account for all of the marketplace factors that motivate a licensee to change its community of license.

15. Similar concerns are expressed regarding the tentative conclusion that a change in the community of license of a television station be approved only if the new community is preferable under the television allotment priorities and policies. Citadel notes that television allotment priorities have not been revised since 1952, and do not account for the availability of alternative video delivery media such as cable television, satellite dishes, and videotape recorders. Citadel argues that a mutual exclusivity requirement would be a sufficient limitation to the rule, and therefore it is unnecessary to utilize the allotment criteria as well. Harron Communications Corporation ("Harron"), among others, states that the proposal must account for the different standards governing FM and television licensees. Citing to *Buena Vista Telecasters of Texas, Inc.*,[9] Harron states that television stations are generally considered regional in nature because of the scarcity and propagation characteristics of television channels, whereas radio stations can focus narrowly on local needs, thereby making a determination of the preferred community of license for a television station difficult. Pappas Telecasting ("Pappas") shares this view.

16. Several commenters discuss the possible effects of the proposal on their television stations, generally arguing that a change in a community of license should not be blocked by strict adherence to the Commission's television allotment criteria if the change results in significant public interest benefits. Telemundo of Galveston-Houston ("Telemundo"), licensee of a Spanish-language television station in Galveston, Texas, notes that its service to Houston's Hispanic population is limited due to the misalignment of many home receiving antennas, but that it cannot move its antenna to improve service to Houston and still provide a city grade signal over Galveston. Telemundo notes that it might be able to change its transmitter site if it could utilize the proposed procedure and change its community of license to Houston, but might be unable to do so unless it could show a decisive Section 307(b) preference for Houston over Galveston. Citadel notes that the allotment criteria could prevent a reassignment of its television satellite station from the small town of Albion, Nebraska, to Lincoln, Nebraska, where it could operate as a full service station. In that event, Citadel claims it would seek to reassign its station to a town near Lincoln that would be preferable under the criteria.

17. Harron asks the Commission to specify that the proposed procedure would be available to licensees seeking to reassign to their allotted communities channels which were assigned elsewhere pursuant to the Commission's former "15-mile" rule.[10] Harron notes that if the proposed procedure is not available in such cases, a licensee may have to face a comparative hearing in order to return to its originally allotted community.

18. *Intraband Commercial/Noncommercial Television Channel Exchanges.* Telemundo supports the application of this proposal to intraband exchanges. On the other hand, Meredith questions the statement in the *Notice* that the procedure could provide first noncommercial or commercial service "where our present allotment scheme would not allow such service,"[11] noting that no provision of the current scheme prevents the noncommercial operation of a commercial channel. Meredith states that it is unsure whether the Commission is referring to the possibility that a swap, in combination with a change of community of license, could result in the availability of a new allotment previously precluded by spacing requirements, or to the possibility that a noncommercial station economically unable to operate on its current channel could overcome its financial problems by receiving payment in return for a swap with a "less desirable frequency in a less desirable community." Meredith hypothesizes that a noncommercial station licensed to the major city of a market could, in exchange for payment, swap with a commercial station in a fringe community, thereby providing the noncommercial station with cash but leaving the major city without a noncommercial station. Meredith states that the Commission should not permit exchanges when the primary result of the exchange is an influx of capital to the noncommercial station at the cost of reduced noncommercial service to the major city.

19. *Alternative Proposals.* Many of the comments suggest modifications to the proposal. As an alternative to use of existing allotment priorities, several commenters suggest that the Commission require a station seeking to change its community of license to maintain some degree of service to its former community of license. Press suggests that a minimum 60 dBu FM radio signal, or a Grade A television signal, be provided to the former community, while Cox suggests a minimum 67 dBu signal.[12] Cox notes that its proposal would prevent abuse by licensees who would otherwise abandon small markets for larger communities. Pappas proposes that a television station be permitted to change to any community within its city grade contour. CERM/Crow River suggests that licensees be required to show that the former community of license would continue to be served, either by the licensee's station or other stations.

20. NAB suggests that the Commission include language in any amendment to Section 1.420(g) of the Rules stating that the procedure will only be used to further Section 307(b) priorities. NAB believes this is necessary to ensure that the procedure is not used to undermine Section 307(b) and the Commission's mandate of localism.

21. Great American proposes a system similar to that available to AM licensees in which an FM or TV licensee could request a change in its city of license, arguing that this would be consistent with the holding of *Ashbacker*. The Commission would issue a public notice to adopt the change and modify the license if no *bona fide* expressions of interest in the new city of license were received and the change was in the public interest. If expressions of interest were received, the licensee would be free to continue the procedure in a comparative hearing or withdraw its proposal. Several commenters argue that Great American's proposal represents the type of waste and posturing the Commission expressly rejected in *FM Adjacent and Co-Channel Upgrades*.

DISCUSSION

22. After careful review of the comments filed in this proceeding, we are convinced that the Commission's current procedures for modification of FM and television authorizations to specify a new community of license should be amended. The present procedure discourages changes to the tables of allotments that would result in a better overall arrangement of allotments. Many licensees and permittees may be deterred from seeking improvements to technical facilities that would require a modification of its community of license, as they would be at risk of losing their authorizations in a comparative hear-

ing. Accordingly, we will amend the Commission's rules to provide a procedure whereby a licensee or permittee may petition the Commission for an amendment to the FM and television tables of allotments, and modification of its license accordingly, without placing its existing authorization at risk.[13] The procedure is limited to situations in which the new allotment would be mutually exclusive with the existing allotment[14] and will not apply to nonadjacent channel upgrades.[15]

23. This amendment is not precluded by the *Ashbacker* doctrine. The Commission can promulgate rules limiting eligibility to apply for a newly allotted channel when such action promotes the public interest, convenience and necessity.[16] The Court of Appeals has noted that *Ashbacker* applies only to parties whose applications are mutually exclusive, and not to prospective applicants.[17] A party seeking to amend the FM or television tables of allotments is a prospective applicant until its application is submitted and accepted pursuant to the Commission's Rules. "Only by compliance with such procedures may an application enter the ranks of ' *bona fide* applications' protected by *Ashbacker*. " *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1561 (D.C. Cir., 1987).

24. We believe the public interest, convenience and necessity would best be served by allowing permittees and licensees to change their community in the circumstances set forth herein without being subject to competing applications. We recognize that, as a general matter, policy considerations may favor permitting the filing of competing applications.[18] However, our current policy discourages changes of community that could improve service to the public because licensees are generally unwilling to propose such service improvements because the result would be a comparative hearing. Removal of this disincentive through a change in our current policy would serve the public interest. In addition, where the new allotment is mutually exclusive with the existing one, foreclosing competing applications does not, as a practical matter, deprive potential applicants of opportunities for comparative consideration. Under our rules such potential applicants already are precluded from requesting such a new allotment because of the mutual exclusivity with the existing one.[19] Moreover, as suggested above, under our existing policy, they will rarely, if ever, have the opportunity to file a competing application in response to a request by the existing licensee for a change of community because the potential for such a competing application discourages the filing of such requests by existing licensees. Accordingly, our change in this order does not significantly change the actual opportunities afforded to potential applicants, but this change does permit service improvements that are otherwise almost certain not to occur. In addition, the public interest in making available such otherwise unavailable improved service outweighs any concern that an applicant more qualified than the existing licensee to provide such service may exist.[20]

25. In order to amend an allotment using this procedure, we will compare the proposed allotment plan to the existing state of allotments for the communities involved. If adoption of the proposed allotment plan would result in a net service benefit for the communities involved (that is, if the plan would result in a preferential arrangement of allotments), we will adopt the proposal. We conclude that the best way to ensure a preferential arrangement of allotments is to apply the relevant FM or television allotment priorities and policies. The Commission has applied the current FM allotment criteria since 1982, and the television allotment criteria since 1952. We believe that continuing to use the allotment criteria, instead of employing an *ad hoc* approach to determine if a new community of license is preferable to the former community, is consistent with the public interest and lends certainty to the process by retaining a body of precedent upon which a petition for change of the community of license can be analyzed. In addition, we note that requests for a change in community of license involving a transmitter site change or a change in class of channel may conflict with other rule making proposals not involving a change in community of license.[21] We believe it appropriate to evaluate all conflicting proposals, regardless of whether they involve a change in community of license, using the same priorities and policies. We note, in response to comments suggesting that the Commission create a more flexible test for this procedure, that the Commission's policy is to apply the allotment criteria in a flexible manner where circumstances warrant.[22]

26. Several commenters suggest that we require a licensee seeking a change in its community of license to maintain some degree of service to its former community of license as an alternative to the use of the allotment criteria. We decline to take into account the degree of service a licensee will maintain to its original community of license as a factor in making our decision. Were we to accept continued coverage as a factor in favor of a licensee seeking to change its community of license, we would have to ensure that the coverage was provided to the original community in perpetuity, lest the licensee avoid one of the terms of its promise that allowed the move. On the other hand, we should not preclude a change in community of license that would result in a preferential arrangement of allotments solely because the licensee will no longer serve its original community of license. Instead, we will rely solely on a determination as to whether the change would result in a preferential arrangement of allotments.

27. Cox states in its comments the possibility that this procedure may facilitate abuses of process by rural licensees desiring to serve large urban areas. There may be situations in which, consistent with the allotment priorities and policies, a licensee may try to increase its total population served by moving, for instance, from a rural community to a suburban community. We do not believe that such a move necessarily constitutes abuse of process so long as the new community of license is preferable to the original community under our allotment criteria, although the result may be removal of some service from communities on the fringe of an urban area. The application of the allotment priorities and policies, in conjunction with the Commission's minimum distance separation requirements[23] and the present intensive use of spectrum in urban areas, will act as a barrier to the clustering of stations in major metropolitan areas. We will, however, carefully monitor these situations, and will address the issue if necessary.

28. A licensee might want to use the new rule in one of three circumstances. First, a licensee might propose a change in its community of license, but no change in its transmitter site or, for an FM station, its channel class. Second, a licensee might propose to change its transmitter site and community of license. Third, applicable only to the FM service, a licensee might propose to change its community of license and channel class, and possibly its

transmitter site as well.[24] However, in all three cases, we will not allow any broadcaster to take advantage of this new procedure if the effect would be to deprive a community of an existing service representing its only local transmission service. In the first case the question of whether the amended allotment would result in a preferred distribution of facilities under our allotment priorities and policies will serve as a threshhold test of the acceptability of the proposal.[25] In the second and third cases, the preclusive effect of the allotment changes, and, therefore, it is possible that other changes mutually exclusive with the existing station could be advanced in the proceeding. We believe it is best to take into account the totality of the service improvements resulting from a proposed change in community of license when determining whether an allotment proposal should be approved. Therefore, in the second and third situations, we will decide the proposal on a case by case basis, based on whether or not the proposed changes, taken as a whole, would advance our allotment priorities.[26] Under the allotment priorities, we will be particularly hesitant to deprive an area of an existing first or second reception service. These precautions will ensure that the change in community of license will result in a preferential arrangement of allotments.

29. We believe that it is unnecessary to accept NAB's suggestion to include language in the new rule stating that the procedure will only be used to further Section 307(b) priorities. The rule merely reflects procedures for amending the tables of allotments in certain circumstances. The substantive standards for allotments have been separately established by the Commission in policy statements and various *Report and Orders*, and we shall apply those substantive standards and policies in any rule makings encompassed by the rule adopted herein.

30. We will not specify, as suggested by Harron, that this procedure be available to licensees seeking to reassign to their allotted communities channels assigned elsewhere pursuant to the Commission's former "15-mile" rule. The procedure we now adopt is limited to situations in which a licensee files a rule making petition and an associated request for modification of license simultaneously. Unlike the FM table of allotments, the television table of allotments has not been modified to conform its provisions to the actual usage of channels under the "10-mile" and "15-mile" rules by licensees. Therefore, licensees seeking to modify their assignments to specify the allotted community listed in the tables may request to do so by filing an application for a modification of license, and we will grant the request where appropriate.

31. This procedure will be applicable to exchanges of intraband noncommercial and commercial channels. It does not apply to interband (that is, UHF-VHF) channel exchanges. The Commission's Rules currently permit intraband exchanges,[27] and the procedure should apply to exchanges consistent with our rules. The possibility of abuse of the new rule is minimal, because adherence to the allotment criteria will ensure that any exchange involving a change in the community of license will be made in the public interest and not solely in the financial interests of the participants. Furthermore, use of this procedure may allow either or both stations to offer upgraded service previously prohibited due to a mutually exclusive allotment.

32. We disagree with Meredith's claim that the procedure is unnecessary for television channels. While, unlike the FM service, there is no classification system in the television service and therefore no possibility of an "upgrade" to be derived from a change in community of license, the public may nonetheless benefit from application of this procedure to the television service. For instance, a licensee may, through a change in its community of license, be able to move its transmitter in order to improve service to the surrounding area in a manner consistent with our allotment priorities. Our rules should assist licensees seeking such results.

33. Meredith contends that this procedure could allow a television station to circumvent the Commission's programming exclusivity rules. The incentives for moving a station in order to avoid these rules are not clear. For instance, a licensee in urban community A may seek to relocate to rural community B, located sufficiently far from community A to be beyond the zone of protection described in Section 73.658(m) of the Rules, but close enough that its signal can still reach community A. While the licensee may then choose to broadcast duplicative syndicated programming to community A, the licensee has no protection from the possibility that a competing station in community A may broadcast programming duplicative of what the community B licensee is broadcasting. This loss of protection significantly diminishes the value of broadcasting the programming to both stations, and therefore may in fact be a disincentive to relocation.[28] Even if a licensee does move to a suburban community solely to avoid the scope of the programming exclusivity rules, the amended allotment would not have been approved had it not resulted in a preferential arrangement of allotments under the allotment criteria.[29]

34. We decline to adopt Great American's alternative procedure. The Great American proposal would essentially permit a licensee to amend the table of allotments to change its community of license if, after public notice of the proposal, no expressions of interest were filed for the proposed community. Adoption of this proposal would not be in the public interest, as it is similar to the procedure we determined in *FM Adjacent and Co - Channel Upgrades* to be wasteful of Commission, petitioner, and commenter resources.

CONCLUSION

35. Based on the Commission's consideration of the record in this proceeding and for the reasons set forth above, the Commission concludes that it is appropriate to amend section 1.420(i) of its rules and regulations as set forth in the attached Appendix B.

36. FINAL REGULATORY FLEXIBILITY ANALYSIS

I. Need and Purpose of Rule

The Commission's rules and policies discourage FM and television licensees and permittees from changing the community of license of an allotment in order to implement service improvements, as any amendment to the FM or television tables of allotments changing an allotment's community of license is regarded as an event triggering an opportunity for interested parties to file applications for the allotment. Virtually no licensee or permittee has been willing to risk the loss of its allotment in a comparative

hearing and, as a result, the public is deprived of potentially beneficial service improvements. The amended rule provides a procedure whereby a licensee or permittee may request a new community of license during the course of rule making proceedings to amend the FM and television tables of allotments without risking loss of its authorization to a competing applicant. In addition, the procedure will help small businesses by reducing the costs involved in changing a community of license.

II. Flexibility Issues Raised in the Comments

No significant regulatory flexibility issues were raised in the comments.

III. Significant Alternatives Considered but Not Adopted

The comments received in response to the *Notice* proposed the following significant alternatives: (1) instead of using the existing allotment priorities and policies to determine whether the table of allotments should be amended, to employ a totality of the public interest test or require the licensee to maintain a certain degree of service over the former community of license; and (2) an alternative procedure that would permit a licensee to file a petition for an amendment of the table of allotments and modification of its license and, if after the Commission issued public notice of the petition and no *bona fide* expressions of interest were filed, the Commission could make the changes. We reject the first alternative because there are numerous benefits accompanying the use of the present allotment priorities and polices compared to developing a new system for this procedure. Furthermore, these criteria constitute the Commission's current method of implementing the policies of Section 307(b) of the Communications Act, and will ensure that no community is deprived of necessary FM and television service. We reject the second alternative because it would be wasteful of Commission, petitioner, and commenter resources. We rejected similar procedures in *Modification of FM Broadcast Licenses to Higher Class Co - Channel or Adjacent Channels*, 60 RR 2d 114 (1986) for similar reasons. In any event, licensees will not face additional burdens pursuant to the procedure we adopt herein, nor would they have under the alternatives considered but rejected, as use of the procedure will be purely voluntary.

37. The Secretary shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (5 U.S.C. Section 603(a) (1982)).

PAPERWORK REDUCTION ACT STATEMENT

38. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to contain no new or modified form, information collection, and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

ORDERING CLAUSES

39. Accordingly, IT IS ORDERED, That Part 1 of the Commission's Rules and Regulations are amended, effective **July 31, 1989,** as set forth in Appendix B below.

40. IT IS ALSO ORDERED, That the motion of Citadel Communications Co., Ltd., for leave to file late comments is granted.

41. IT IS ALSO ORDERED, That this proceeding IS TERMINATED.

42. Authority for the action taken herein is contained in Sections 1, 2, 4(i) and (j), 303(r), 316, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), (j), 303(r), 316, 403.

43. For further information concerning this proceeding, contact Michael Ruger, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Donna M. Searcy
Secretary

APPENDIX A

The following parties submitted comments:

Amerimedia, Inc.

Michael R. Birdsill

CERM Broadcasting Corporation and Crow River Broadcasting, Inc. (joint comments)

Christian Voice of Central Ohio

Citadel Communications Co., Ltd.

Cox Enterprises, Inc.

Great American Television and Radio Company, Inc.

Don R. Davis

Harron Communications Corporation

KCFX Radio, Inc.

Kudzu Broadcasting Partnership

Maines Broadcasting, Inc.

Meredith Corporation

National Association of Broadcasters

Pappas Telecasting Incorporated

Premier Broadcast Group, Inc.

Press Broadcasting Company

Keith Reising

Telemundo of Galveston-Houston, Inc.

Tri-Valley Broadcasting Corporation

The following parties submitted reply comments:

Christian Voice of Central Ohio

Citadel Communications Company, Ltd.

Maines Broadcasting, Inc.
National Association of Broadcasters
Pappas Telecasting Incorporated
Premier Broadcast Group, Inc.

APPENDIX B

Part 1 of Title 47 of the CFR is amended as follows:

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303.

2. Section 1.420 is amended by adding new paragraph (i) to read as follows:

§ 1.420 Additional Procedures in Proceedings for Amendment of the FM, Television, or Air Ground Table of Allotments.

* * * * *

(i) In the course of the rule making proceeding to amend § 73.202(b) or § 73.606(b), the Commission may modify the license or permit of an FM or television broadcast station to specify a new community of license where the amended allotment would be mutually exclusive with the licensee's or permittee's present assignment.

FOOTNOTES

[1] This policy was expressed in *Riverside and Santa Ana, California*, 65 FCC 2d 920 (1977), *recon. denied*, 68 FCC 2d 557 (1978).

[2] 60 RR 2d 114 (1986). In that proceeding (hereinafter cited as " *FM Adjacent and Co - Channel Upgrades* "), the Commission amended Rule 1.420 to permit FM licensees to upgrade their facilities on a higher class adjacent or co-channel in the same community in the context of a rule making proceeding. However, this amendment did not overrule *Riverside and Santa Ana. See Green Cove Springs, FL*, 3 FCC Rcd 2195 (1988).

[3] A list of commenting parties is set forth in Appendix A. The comments of Citadel Communications ("Citadel") were filed on January 10, 1989, one day after the deadline for filing comments. Citadel states that a computer malfunction prevented filing of the comments on January 9, although a separate technical statement to be included with the comments was timely filed. Late-filed comments are not routinely accepted for consideration. In this case, as good cause has been shown and acceptance will not prejudice other parties to this proceeding, we will consider Citadel's statement as a petition to acccept late-filed comments and grant it pursuant to section 1.3 of the Commission's rules, 47 C.F.R. § 1.3 (1987).

[4] *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

[5] *Amendments to the TV Table of Assignments to Change Noncommercial Educational Reservations, Notice of Proposed Rule Making* in MM Docket No. 85-41, 50 FR 10817, March 18, 1985. An intraband, but *not* an interband, channel exchange procedure was adopted in the proceeding. *See Report and Order* in MM Docket No. 85-41, 51 FR 15628, April 25, 1986, *recon. denied*, 3 FCC Rcd 2517 (1988) (hereafter cited as *Noncommercial Educational Reservations).*

[6] 351 U.S. 192 (1956).

[7] *See* 47 C.F.R. § 73.658(m). In its comments, Meredith refers to "syndicated exclusivity", yet discusses territorial exclusivity. Our discussion will focus on territorial exclusivity.

[8] The FM priorities are (1) first aural service, (2) second aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982). The television allotment priorities are (1) to provide at least one television service to all parts of the United States, (2) to provide each community with at least one television broadcast station, (3) to provide a choice of at least two television services to all parts of the United States, (4) to provide each community with at least two television broadcast stations, and (5) to assign any remaining channels to communities based on population, geographic location, and the number of television services available to the community from stations located in other communities. *Sixth Report and Order*, 41 FCC 148, 167 (1952). We have generally been willing to apply the television priorities in a more liberal fashion than the FM priorities due to the recognition that television is a more regional service. *See, e.g., Cleveland Television Corp.*, 91 FCC 2d 1129 (Rev. Bd. 1982), *aff'd*, 732 F.2d 962 (D.C. Cir. 1984).

[9] 94 FCC 2d 625, 628 (Rev. Bd. 1983).

[10] The "15-mile" rule, formerly Commission Rule 73.607(b), 47 C.F.R. § 73.607(b) (1982), permitted a television station to be located within fifteen miles of the community of license listed in the Television Table of Allotments without requiring the licensee to petition for an amendment to the Tables. A similar procedure, Rule 73.203(b), 47 C.F.R. § 73.203(b) (1982), applied to FM radio stations. Both rules were deleted in *Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy*, 93 FCC 2d 436 (1983), *recon. denied*, 56 RR 2d 835 (1984).

[11] *Notice* at 6891.

[12] Cox does not specify in its comments whether its proposal would apply to FM or television signals, or both.

[13] There are several entries in the FM and television tables of allotments involving hyphenated allotments. The Commission has hyphenated allotments in three instances: in order to postpone until the application stage any unresolved or close questions as to which community should use the assignment; upon a showing that a station licensed to a small community is likely to fail unless it is able to apply for authority to operate from a larger community; or upon a showing that the communities should be treated as one community by reason of their proximity and common social, cultural, trade and economic interests. *Hampton-Norfolk-Portsmouth-Newport News, Virginia*, 53 RR 2d 53, 55 (1983). The instrument of authorization for stations operating on hyphenated allotments generally specifies one of the hyphenated communities as the community of license, and we have historically considered on a case-by-case basis applications to modify such authorizations to specify a new community of license. We will continue to do so, but our action today also provides licensees on such allotments with the option of seeking "dehyphenation" of the allotment and simultaneous modification of license in a rule making proceeding.

[14] This rule will apply to adjacent and co-channel changes for FM stations, and to co-channel, adjacent channel, and UHF taboo channels in the television service. *See* 47 CFR §§ 73.207, 73.610, 73.698.

[15] No comments were received in response to the tentative conclusion in the *Notice* to permit competing expressions of interest in cases in which a licensee or permittee proposes a modification of its present assignment to a community to which the same channel could be allotted with a site restriction in relation to the proponent's present assignment. In this case, we will accept competing expressions of interest for the site restricted allotment, as the allotment is not mutually exclusive and could provide a new service.

[16] *See U.S. v. Storer*, 351 U.S. 192 (1956).

[17] *Reuters Ltd. v. FCC*, 781 F.2d 946, 951 (D.C. Cir. 1986).

[18] In *Cheyenne, Wyoming*, 62 FCC 2d 63 (1976), the Commission refused, in a rule making proceeding, to modify the license of an existing licensee to specify operation on a newly assigned channel of a superior class in the same community. The Commission stated that the public interest would be best served by affording other interested parties an opportunity to file an application and to be given consideration for the higher class frequency. *Id.* at 67. In this order, as in our *FM and Adjacent Co-Channel Upgrades* order, we believe the public interest weighs in favor of a different approach, for the reasons explained herein.

[19] *See FM Adjacnt and Co-Channel Upgrades* at 119. Of course, such potential applicants were not always barred from requesting an alternative allotment. They could have made a competing request when the existing allotment was made.

[20] *Compare Cheyenne, Wyoming*, 62 FCC 2d at 67-68.

[21] For example, assume there are three communities, A, B, and C. Community B is located between communities A and C. FM licensee X, operating on Channel 240A in community A, petitions to change its community of license to community B in order to operate at Channel 240C2. This move, however, would be mutually exclusive with a petition filed by Y for an allotment of Channel 240A to community C. The Commission will evaluate the two proposals pursuant to the FM allotment priorities and policies to determine which proposal would result in a preferential arrangement of allotments.

[22] *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982), *Sixth Report and Order*, 41 FCC 148, 172 (1952).

[23] Commission Rules 73.207, 73.610, 47 C.F.R. §§ 73.207, 73.610.

[24] The second and third instances may or may not result in continuation of a city grade signal in the original community of license.

[25] For example, suppose FM licensee X sought to change its community of license from community A, in which it is one of two local stations, to community B, with five local stations. Communities A and B have roughly the same population. Under such circumstances, second local service is clearly of a higher priority than sixth local service. As a result, we would dismiss X's petition as unacceptable.

[26] For example, assume there are three communities, A, B, and C. Community A, with a population of 10,000, has two local radio services. The licensee in Community A proposes to relocate to community B, a community of 30,000, as that community's third local transmission service. However, the move would also permit the allotment of a first local service to community C, which has a population of 1,500. The Commission will evaluate the proposal in order to determine whether the combined service gains in community B and the allotment of first local transmission service in community C outweigh the loss of second local service in community A.

[27] Commission Rule 1.420(h), 47 C.F.R. § 1.420(h).

[28] In addition to there being no clear incentive to relocate simply to circumvent our program exclusivity rules, we note that a move may also affect the copyright status of a station carried on cable television systems. *Cf. Cable Compulsory License (Policy Decision)* in Docket No. RM 85-2, 52 FR 28362, July 29, 1987, by the Copyright Office. These effects are by no means uniformly favorable. A licensee may risk its cable carriage in the original community because of the higher copyright royalties charged to carry distant signals.

[29] In the event that such a move results in egregious harm to a licensee, that party may petition to amend Commission Rule 76.51, 47 C.F.R. § 76.51, in order to hyphenate the television markets involved.

DISSENT STATEMENT OF COMMISSIONER JAMES H. QUELLO

Re: In the Matter of Modification of FM and Television Authorizations to Specify a New Community of License (MM Docket No. 88-526)

The table of allotments for FM and television broadcasting constitutes the cornerstone of communications policy. Section 307(b) of the Act obligates the Commission to license broadcast facilities to communities in a fair, efficient, and equitable manner. Our allotment decisions are designed to ensure that as many communities as possible are able to obtain service.[1] The orderly distribution of these facilities is essential if *all* Americans are to have access to free over-the-air broadcasting service.

By removing existing procedural constraints, the majority's decision will give licensees the ability, indeed the incentive, to change their communities of license, modify their facilities or both. The item acknowledges that licensees in rural areas will attempt to move towards suburban or more urban areas merely to increase the size of their audiences. From an economic standpoint, such a result may be more efficient, but it runs counter to the time honored policy of fairly distributing licenses to communities throughout the United States.

Once these procedural restraints are removed, mere reliance on our existing allotment policies may not, by themselves, prevent such migration. For example, many FM allotment decisions are not premised on the classic first rural service, second rural service and first local service criteria. Instead, many allotment decisions are made pursuant to the fourth criterion, "other public interest factors." This element takes into consideration a host of factors which, in my opinion, may not adequately consider the importance of geographic distribution on a community-by-community basis.

Experience tells me that we will begin to see a gradual movement from communities with limited populations and low incomes to larger more economically advantageous communities. Admittedly, the decision does prevent a station from abandoning its community when it is the only facility in the market. While this makes the decision more palatable, it simply does not go far enough. This decision will set in motion the entire table of allotments for the FM and television services.

On balance, the public's interest in maintaining the integrity of our tables outweighs the private benefit that may accrue to individual broadcasters from moving to more economically advantageous communities. Therefore, I must dissent.

FOOTNOTE FOR STATEMENT

[1] *See* Revision of FM Assignment Policies and Procedures, 90 F.C.C. 2d 88, 92 (1982); *Sixth Report and Order*, 41 F.C.C. 148, 167 (1952).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

Revision of Annual Report Form M

MEMORANDUM OPINION AND ORDER

Adopted: April 27, 1989; Released: May 12, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Under Part 43 of its Rules, Reports of Communications Common Carriers and Certain Affiliates, the Federal Communications Commission requires telephone companies to file certain financial, corporate, and statistical data on an annual basis.[1] The required form for such filings is entitled Annual Report Form M (Form M).[2]

2. On September 9, 1988, the Chief, Common Carrier Bureau, released an *Order Inviting Comments* (*OIC*) proposing revisions of Form M.[3] The revisions were proposed because recent changes in the Commission's accounting requirements for telephone companies had made the existing Form M obsolete, and a significant volume of information contained therein, while still necessary for regulatory purposes, could not be accommodated in the automated reporting and management information system (ARMIS) the Commission had adopted in CC Docket 86-182.[4] In the *OIC*, a total of 15 schedules were proposed for elimination. It was also proposed that four new schedules be added and that all other Form M schedules be revised and retained.

3. This Order establishes the new Form M based on the proposal in the *OIC* and the comments received. It eliminates 22 of the old Form M schedules. The information contained on these 22 schedules that is still needed for regulatory purposes is incorporated, for the most part, into six new replacement schedules. In addition, three entirely new schedules have been added. All other schedules are revised in varying degrees and retained. Viewed in terms of the number of schedules contained in the Form M, there is a reduction from 58 to 45. Also, the proposal to require certain depreciation data on proposed Schedule 14A on a state-by-state basis has not been adopted, thus greatly reducing the proposed volume of depreciation data.

II. BACKGROUND

4. On September 17, 1987, the Commission released the *ARMIS Order* establishing ARMIS for local exchange carriers to provide for easy, Commission-wide access to reliable consistent data. Such automation was intended to make regulation of these companies more effective by facilitating the timely and efficient analysis of revenue requirements and rates of return, providing for an improved basis for audit and other oversight functions and enhancing the Commission's ability to quantify the effects of alternate policy proposals.

5. When the Commission established the initial requirements in the *ARMIS Order*, it also considered adopting the Form M *in toto* as part of the annual reporting requirement. However, it decided instead to identify, and require automation of, only the information for which automated reporting was most immediately important. It delayed the inclusion of the entire Form M in the automated reporting requirements, pending further study for four reasons: (1) the Form M was based on the old USOA accounting definitions; (2) some Form M schedules did not lend themselves to automation; (3) other schedules were too seldom used to justify automation; and (4) the Commission believed it should not impose additional reporting burdens unless a specific purpose would be served thereby.[5] In order to update the Form M and further accomplish its goal of automating data collection, the Commission directed the Bureau to review the current Form M to determine which schedules are no longer needed, which schedules require revision, and which new schedules must be added. The Commission also directed the Bureau to decide which schedules should be automated and to incorporate them in the automated reporting system.[6]

6. The Bureau issued the *OIC* on September 9, 1988, and interested parties were invited to provide comments by October 12, 1988 and reply comments by October 27, 1988. The reply comment date was later extended to November 4, 1988. Comments were received from 17 parties and reply comments were received from ten parties (see Attachment A).

7. Most parties generally supported the Bureau's efforts, but suggested that the Bureau did not go far enough in its effort to reduce reporting burdens and that several proposed schedules required additional explanation or modification before they could be completed and submitted properly.

8. We will address these concerns in succeeding paragraphs grouped according to the action we take with respect to existing schedules we eliminate or revise. With respect to the schedules we finally adopt as a part of the Form M (*See* Attachment B), carriers will notice that the schedule numbering scheme has been changed from the original proposal and that the carrier identification codes have been expanded to four spaces. We have changed the numbering system to avoid any lingering confusion between old and new Form M schedules using the same number. In renumbering the schedules we have used alphabetical prefixes to designate the orientation of the schedules. For example, the prefix A will be used for corporate and general information, B for balance sheet oriented schedules, I for income statement oriented schedules, and S for statistical schedules. The expansion of the carrier code spaces will permit use of the same ARMIS study area codes prescribed for operating companies that were recently established in Docket 86-182[7] and thereby set the stage for future incorporation of additional schedules into ARMIS.

III. CONFIDENTIAL TREATMENT OF REPORTED DATA

1. Proposal

9. The *OIC* did not propose confidential treatment of any of the data proposed in the revised Form M. AT&T, BellSouth, Pacific Telesis and SNET express concern about public disclosure of some of the data proposed to be reported in the revised Form M and recommend confidential treatment of the data about which they are concerned. AT&T is concerned about public disclosure of data required on numerous proposed schedules. Pacific Telesis is concerned about public disclosure of nonregulated revenues required on the proposed Schedule 11, *Income Statement Accounts*. In addition, both BellSouth and Pacific Telesis express concern about reporting investment data on proposed Schedule 17, *Receivables and Investments - Affiliated and Nonaffiliated Companies*. Finally, SNET alleges that reporting of membership fees and dues on proposed Schedule 42 is proprietary and should be held confidential.

2. Comments

10. AT&T argues that Schedule 10, *Balance Sheet Accounts*, and Schedule 14A, *Analysis of Entries in Depreciation Reserve*, would provide specific plant and equipment investment data which would provide its competitors with valuable information about its internal resource allocations and investment priorities. It also states that Schedule 11, *Income Statement Accounts*, would provide a detailed disaggregation of the sources of AT&T's revenues (*e.g.*, long distance inward, long distance outward, long distance private network) and costs (*e.g.*, analog electronic expense, digital electronic expense, operator systems expense) which would give competitors a useful profile of its costs of doing business and thereby cause AT&T competitive harm. AT&T lists 11 other schedules[8] that disclose network plant additions and retirements which it alleges would be competitively harmful if disclosed. Finally, AT&T identifies six schedules[9] that disclose sales and demand data which it claims would be competitively harmful if disclosed.

11. Pacific Telesis is concerned that Schedule 11, *Income Statement Accounts* would disclose information about its nonregulated products and services which would be competitively harmful. It acknowledges that the data reported for nonregulated services would be aggregated into a few accounts on the schedule. It claims, however, that in the early periods of providing competitive products, a carrier may have limited numbers of products and the proposed reporting may be insufficient to protect proprietary information even when it is reported on an aggregated basis. If some material benefit to the Commission results from the reporting of nonregulated revenues in Form M, Pacific Telesis suggests that the Commission can permit a carrier to protect its information by using a method similar to that provided under the ARMIS reporting scheme, which it claims would be administratively preferable to the protection of confidential information available through Freedom of Information Act (FOIA) procedures established in the Commission's rules.[10] Also, Pacific Telesis claims that the reporting of nonregulated revenues could be eliminated from Form M without diminishing the information available to the Commission because the same information would be available in the ARMIS Quarterly Report and ARMIS USOA Report filings.[11]

12. BellSouth and Pacific Telesis both object to the disclosure of undistributed earnings or losses of affiliates on Schedule 17 for essentially the same reasons. Both allege the information is proprietary and not necessary for any regulatory purposes.[12] SNET believes information relating to membership fees and dues is not necessary for any regulatory purpose and believes this information should be granted proprietary treatment.[13]

3. Discussion

13. The concern of Pacific Telesis as it relates to Schedule 11 focuses on the disclosure of nonregulated revenues. Pacific Telesis acknowledges, however, that nonregulated revenues are aggregated on the proposed Schedule 11. In our view it would be a difficult task for competitors to relate specific revenues to particular nonregulated activities from the data proposed in Form M. Moreover, we do not believe the procedures adopted for confidential treatment of data in ARMIS wherein sensitive data is deleted from a public version of the report would be desirable for Form M. The use of that methodology for confidential treatment would have undesirable consequences which would extend beyond the accounts over which Pacific Telesis expresses an immediate concern and would effectively end the usefulness of Schedule 11 to the public. For example, Account 5280, Other Nonregulated Revenue, cannot simply be unreported without having an effect on other amounts such as total operating revenues. If the correct total operating revenues were reported, one could simply deduct the sum of the other operating revenue accounts from total operating revenues to determine how much was omitted in Account 5280. Thus, the omission of one account would lead to the omission of other data or the unpalatable alternative of reporting incorrect totals, such as total revenues which in turn would yield an incorrect net income. For these reasons we will not follow the deletion procedures adopted in ARMIS for Form M purposes.

14. BellSouth and Pacific Telesis are concerned that Schedule 17 would disclose the reporting carriers' share of undistributed earnings or losses of affiliated companies, which they believe is proprietary and should not be available for public inspection. It is our view that this reporting is necessary in monitoring the provision of regulated services because it forms a part of the complete picture of the relationships between a carrier and its affiliates and because substantial and continuing losses of particular affiliates might otherwise go unnoticed until they achieved a potential for harm to the provision of regulated services. The comments of BellSouth and Pacific Telesis do not elaborate on why such reporting should be given confidential treatment. As a result, we will not establish such a policy here with respect to the earnings and losses of affiliates. Such issues are more appropriately addressed in a separate forum. If BellSouth, Pacific Telesis or any other carrier believes such disclosure would be harmful, they can request confidential treatment pursuant to the procedures described in Section 47 C.F.R. 0.459 of the Commission's rules.

15. AT&T has not presented a persuasive argument for confidential treatment of its Form M data. AT&T's recommendation for confidential treatment is much broader than the recommendations made by BellSouth or Pacific

Telesis. AT&T recommends confidential treatment of data related to its regulated activities reported on 20 different schedules. Moreover, this information has been, for the most part, reported by AT&T for many years (including more than 5 years since divestiture) in only a slightly different format. Changes have largely been made to clarify definitions and to provide information consistent with the new USOA and current technology.

16. The information in the revised Form M is needed by this Commission to regulate the carriers' regulated activities. Moreover, the public has relied on Form M in the past to evaluate the carriers' operations and the results of regulation. We do not believe the changes proposed in this proceeding should be used as a basis of withholding the data. Such action would not only deprive the public of data it has relied upon in the past, it would also encumber this Commission's use and handling of the data in performing its regulatory functions. Accordingly, AT&T's recommendation for confidential treatment of Form M data will not be adopted. As with the other carriers, if AT&T believes that disclosure of specific information they are providing would be harmful, they can still seek relief pursuant to confidential treatment procedures described in Sections 47 C.F.R. 0.459 of the Commission's rules.

IV. GENERAL INFORMATION SCHEDULES

1. Proposal

17. Form M currently contains the following General Information Schedules:

General Instructions

Schedule 1, *Identity of Respondent*

Schedule 2, *Control Over Respondent*

Schedule 3, *Board of Directors*

Schedule 4, *Principal General Officers*

Schedule 5, *Voting Powers and Elections*

Schedule 6, *Stockholders*

Schedule 7, *Important Changes During the Year*

18. The *OIC* proposed to retain these schedules but with appropriate modifications to correct references to make them consistent with rule changes such as the replacement of Part 31 with Part 32. It also proposed to eliminate the requirement to file Schedules 3 and 4 for individual respondents who (a) file individual Form 10-K/Annual Reports with the Securities and Exchange Commission (SEC) and (b) file a copy of the Form 10-K/Annual Report as an attachment to the Form M Report. Disclosures of Directors and Executive Officers in Form 10-K/Annual Reports include the name of the officers and directors, their ages, information on their terms of office and their positions with the company. It was tentatively concluded that these disclosures would be adequate for the Commission's regulatory purposes. Individual respondents who did not file Form 10-K/Annual Reports would be required to file Schedules 3 and 4 as shown in *OIC* Attachment C.

2. Comments

19. Commenting parties generally agree with the elimination of requirements to file Schedules 3 and 4 as proposed by the Bureau.[14] However, USTA requests that the schedules proposed for use by carriers not filing SEC Form 10-K/Annual Reports be modified to include only the information reported in the Form 10-K, since the Bureau has tentatively concluded that the information in the Form 10-K is adequate for the Commission's regulatory purposes.[15] In addition, USTA recommends that companies with a single stockholder not be required to provide proposed Schedule 6, *Stockholders*. USTA contends that if a company is owned by a single stockholder then the name of the stockholder would be reported in Schedule 2, *Control Over Respondent*, as the entity controlling the carrier and would be reported again as the only stockholder on Schedule 6. USTA also requests that Item 3 of Schedule 7, *Important Changes During the Year*, be reworded to require that a service territory map be included only when changes in territory have occurred and that carriers be required to disclose any change in accounting standards adopted during the year.[16]

3. Discussion

20. Since commenting parties are in general agreement with the tentative conclusion that the information on directors and executive officers in the SEC Form 10-K/Annual Report could be used in place of the information on Schedules 3 and 4, we will not require those carriers who file an SEC Form 10-K/Annual Report at the operating company level to file Schedules 3 and 4, provided that they file an SEC Form 10-K/Annual Report with their Form M. We agree with USTA that Form M Schedules 3 and 4, in their proposed format, require information beyond what is submitted in the SEC Form 10-K/Annual Report. We do not believe this additional information is necessary. Therefore, we have decided to amend the schedules and the instructions so as to make information required in these schedules more comparable to the information on directors and executive officers contained in the SEC Form 10-K/Annual Report.

21. Thus, from proposed Schedule 3, we delete (1) the number of meetings attended during the year, (2) fees paid during the year, (3) number of directors provided for by the charter or by-laws, as amended, (4) number of directors required to constitute a quorum, and (5) a statement of the powers and duties of the executive committees. We also delete information from Schedule 4 that exceeded the information required in the SEC Form 10-K/Annual Report. Because these deletions greatly reduce the amount of information that we continue to collect on directors and officers, the remaining information has been combined into one schedule to be filed by companies not filing SEC Form 10-K/Annual Report. This new schedule, shown in Attachment B of this Order, is entitled Schedule A-3, *Board of Directors and General Officers*.

22. Regarding Schedule 6, we agree that in the case of companies with a single stockholder, the name of the controlling company would be reported on both Schedules 2 and 6. However, we do not believe this is a sufficient reason for relieving these carriers from filing shareholder information, which we believe should remain an integral part of Form M. The requirement to identify one company on Schedule 6 does not appear to be a burdensome requirement. In the Form M Report shown

in Attachment B, we have included this stockholder report as Schedule A-5 and will require it to be filed by all reporting companies.

23. Finally, we do not grant USTA's request that item 3 of Schedule 7 be reworded to require a new service territory map only when changes in territory have occurred. These service territory maps are useful to the Commission's staff and users of Commission public reference facilities. The current requirement to supply a service territory map when changes occur and in years ending in 0 or 5, is imposed because it matches with our cycle for retiring records to Federal Records Centers. The requirement to supply a service territory map every 5 years assures that a service territory map will appear with Form M Reports on hand and available for inspection at the Commission. Because this requirement assures the availability of a service territory map, we retain the existing requirement. We do, however, adopt USTA's suggestion that a requirement be added to report any change in accounting standards adopted during the year. We believe such a requirement will assist users of the Form M in understanding the reported financial results of operations. Following the new numbering format, this schedule is included in Attachment B as Schedule A-6.

V. FINANCIAL AND ACCOUNTING SCHEDULES

A. *Overview*

24. The current Form M has 42 schedules for filing financial and accounting data. These schedules include Schedule 10, *Balance Sheet* and Schedule 11, *Income and Retained Earnings Statement*. The remaining financial and accounting schedules provide detailed analyses of various balance sheet or income statement accounts. The *OIC* proposed a new expanded Schedule 10, *Balance Sheet Accounts* and expanded Schedule 11, *Income Statement Accounts*, which together would report all Part 32 account balances, as well as summary data on plant activity during the year and expense matrix data. It was tentatively concluded that, as proposed, the revised Schedules 10 and 11 would eliminate the need for six of the supporting analytical schedules.[17] In addition, the *OIC* proposed revision, and in some cases elimination, of the remaining balance sheet and income statement supporting schedules. Because many comments were received on the various proposals, we have for purposes of presentation, grouped schedules according to the nature and extent of the comments received. A summary of the proposal, a summary of the comments, and a discussion are presented for each grouping.

B. *Balance Sheet Accounts and Elimination of Certain Related Schedules*

1. Proposal

25. In the *OIC*, we proposed the elimination of Schedule 12A, *Analysis of Telephone Plant Accounts;* Schedule 31, *Retained Earnings Reserved;* Schedule 32, *Dividends Declared;* and Schedule 33, *Analysis of Entries in Other Capital and Retained Earnings Accounts*. The data contained on these schedules that would still be needed for regulatory purposes would be captured on a revised multi-page Schedule 10, which would disclose year end balances for all balance sheet accounts and include beginning balances, additions, retirements, and transfers and adjustments for telecommunications plant accounts. Data on retained earnings and dividends would be included in space provided at the end of the proposed multi-page schedule.

2. Comments

26. SNET, SWB, GTE, Ameritech, Bell Atlantic and USTA note that proposed Schedule 10, *Balance Sheet Accounts* duplicates to a large extent the ARMIS USOA Report and believe that the Commission should eliminate this duplication.[18] Ameritech, USTA and SNET believe that by modifying the ARMIS USOA Report to include the plant account activity and retained earnings, the new Schedule 10 would be unnecessary.[19] USTA and SNET, however, prefer the elimination of the ARMIS USOA Report.[20]

27. Ohio agrees that new Schedule 10 can effectively replace the old Schedule 10.[21] However, both Ohio and NYDPS propose adding two additional column headings for certain pages to show the year-end balance from the preceding year or the beginning balance from the current year, and the increase or decrease in account balances from the preceding year. However, because of the change in the accounting system necessitated by the revised Part 32, which became effective January 1, 1988, Ohio believes the companies should be granted an automatic waiver from using these two additional columns in the first year the new Form M is in effect.[22] NYDPS suggests that the reporting of the beginning balances and changes from the preceding year should be restored to the proposed balance sheet because it believes this information would be especially useful for tracking the transition from the old accounts under Part 31 to the new accounts under Part 32. Further, NYDPS believes that this reporting should not be unduly burdensome since all carriers are required to transfer amounts contained in the old accounts to the new account structure.[23] In addition, NYDPS believes that including the complete list of the plant accounts and an analysis of plant activity on the balance sheet disrupts the flow of basic financial data and exceeds the general scope and purpose of a balance sheet statement. NYDPS contends such information is more appropriate for a supporting schedule.[24]

28. In response to NYDPS and Ohio requests for changes to Schedule 10, USTA contends that demands for restated prior year balances to track the changes from Part 31 to Part 32 would be most burdensome.[25] BellSouth believes that Form M will be automated in the future, and because of this it would serve no useful purpose to restate data from the preceding year since the data could be mechanically accessed and compared if necessary. BellSouth and NYNEX note that Ohio believes it is not feasible to compare 1987 data to 1988 data, because of the changeover in the accounting system necessitated by the revised Part 32.[26] Several other commenting parties also made suggestions of a relatively minor editorial nature.

3. Discussion

29. The concerns the carriers have expressed over duplicative reporting were recently addressed in the *ARMIS USOA Order* released in Docket 86-182.[27] In the *ARMIS USOA Order*, we modified the ARMIS USOA Report (Form 43-02) by adding data on regulated plant accounts, the retained earnings account and the expense matrix required by Section 32.5999(f) of the Commission's rules. These changes, brought Tables I and II of the

ARMIS USOA Report into alignment with what had been proposed, respectively, for Schedules 10 and 11 in the *OIC*. We also modified the ARMIS USOA Report filing requirements so that carriers may file a paper copy of the ARMIS USOA Report as a part of the regular Form M filing. The general instruction of the Form M that we adopt in this Order will incorporate ARMIS instructions by reference and permit carriers to identify Table I as Schedule B-1 and Table II as Schedule I-1. Thus, the concerns expressed by the carriers over duplication of these schedules should be resolved.

30. AT&T is not required to file the ARMIS USOA Report but is required to file the Annual Report Form M.[28] In meeting the obligation to file the Form M, we will require AT&T to file a paper copy of the ARMIS USOA Report in the format prescribed for the local exchange carriers in the *ARMIS USOA Order*. The ARMIS USOA Report, as we noted earlier, is now virtually identical to the new Schedules 10 and 11 we proposed in the *OIC*. For this reason, we do not believe this departure from the *OIC* will be prohibitively burdensome to AT&T. Moreover, as will be discussed elsewhere in this Order, this change would be in consonance with the Office of Management and Budget's request to incorporate as much of the Form M reporting as possible under the ARMIS umbrella.

31. In adopting the revised Form M, we are making a conscientious effort to balance the needs of users with the burdens we are imposing. The suggestions made by Ohio and NYDPS for additional columns on a multi-page schedule are clearly for the benefit of users and run counter to our effort to avoid duplication. If schedules were modified to include year end balances for the preceding year or the beginning balances for the year covered by the report, there would be a continuing duplication of information already reported for the preceding year for more than one hundred lines of data. If users are in need of this information they can simply refer to the reports of the preceding year from the ARMIS data base or the paper copy of the ARMIS USOA Report filed in the Form M for the preceding year. Even if we were to adopt the NYDPS suggestion to add columns for beginning balances and increases or decreases from the preceeding year, we see that a massive revision would be required to accomplish the Part 31 to Part 32 transition monitoring purpose that NYDPS describes. The year end balances for 1987 would not be satisfactory because they would not reflect the Part 32 accounting system which went into effect on January 1, 1988. In order to have any meaning, additional account numbers and account titles from Part 31 would have to be added, and they would be useful for only one year. Because of the unnecessary duplication and the burden that would be associated with trying to achieve the results desired by NYDPS, the suggestions for additional columns will not be adopted.

32. Also, we will not make the modifications suggested by NYDPS to move details on plant accounts to other supporting schedules. By including columns for additions, retirements and transfers and adjustments, we were attempting to minimize the number of Form M schedules needed to supplement ARMIS reporting. We recognize that the expanded plant account information will include details not normally set out in a balance sheet presentation. However, in this case, we believe the benefits of our efforts to maximize the usefulness of the ARMIS USOA Report outweigh any presentational benefit of having a more condensed balance sheet presentation that is different from the ARMIS Report and accompanied by additional supplemental Form M schedules.

C. *Income Statement Accounts and Elimination of Certain Related Schedules*

1. Proposal

33. In the *OIC*, we proposed elimination of Schedule 34, *Operating Revenues* and Schedule 35, *Operating Expenses*. The data contained on these schedules that would be needed for regulatory purposes would be captured on a new multi-page Schedule 11, which would include year-end data on all income statement accounts and include columns for expense matrix data on salaries and wages, benefits, rents, and other expenses as prescribed in 47 C.F.R. §32.5999(f).

2. Comments

34. Ohio suggests that the Commission make available plant specific operating expenses on an intrastate basis for those accounts where depreciation expense is included in expense clearing accounts with other expenses.[29] In reply, Ameritech notes that this is not possible because clearing accounts are not used to record depreciation expense under Part 32.[30] Pacific Telesis makes the same point contending that Part 32 does not require depreciation expense to be included in plant specific expense accounts. Pacific Telesis also believes this suggestion to obtain intrastate data is inappropriate because the Form M is the annual report of the carrier filed on a total company basis. The Ohio recommendation, Pacific Telesis contends, would require carriers to provide expense information solely to assist state regulators.[31]

3. Discussion

35. Ohio's suggestion goes well beyond the historical role of Form M, which has been geared to obtaining total company data, rather than intrastate data. Moreover, the specifics of the suggestion cannot be accomplished under the accounting requirements prescribed in Part 32 because, as the commenting carriers correctly note, depreciation expenses do not flow through clearing accounts before they are recorded in depreciation expense accounts. Therefore, we will not expand the ARMIS USOA Report as Ohio suggests. We will require a paper copy of the ARMIS USOA Report (Table II) identified as Schedule I-1 to be filed as a part of the revised Form M.

D. *Reporting Changes in Financial Position*

1. Proposal

36. In the *OIC*, we proposed a new Schedule 16, *Statement of Changes in Financial Position*. The schedule would identify sources and applications of funds and their effect on working capital during the year.

2. Comments

37. Arthur Andersen recommends that the proposed requirement for a Statement of Changes in Financial Position be changed to a Statement of Cash Flows.[32] Such a change would be in keeping with changes prescribed by the Financial Accounting Standards Board (FASB) for published financial statements and be in keeping with the

Commission's efforts to follow generally accepted accounting principles to the extent regulatory considerations permit. Arthur Andersen cites Statement of Financial Accounting Standards No. 95, *Statement of Cash Flows* (SFAS-95),[33] wherein the FASB concluded that a Statement of Cash Flows provided useful information about an entity's activities in generating cash through operations to repay debt, distribute dividends, or to reinvest to maintain or expand operating capacity. Further, Arthur Andersen also notes the FASB conclusion that a Statement of Changes in Financial Position does not provide users of financial statements with the same information since its focus is on changes in working capital, which does not necessarily equate with an entity's ability to generate cash.

38. USTA urges that the proposed Schedule 16 either not be adopted or be replaced by a Statement of Cash Flows.[34] Among the commenting carriers, the sentiment is the same.[35] In the comments, attention is also drawn to the fact that a Statement of Cash Flows is included as a part of the SEC Form 10-K.[36]

39. Arthur Andersen and the other commenting parties also mention that the FASB pronouncement permits an option as to presentation. One presentation approach shows major classes of gross cash receipts and gross cash payments (the direct method). The other reconciles net income to net cash flows from operating activity (the indirect method).[37] USTA alleges that the indirect method would be the least burdensome since most companies have adopted this method for external reporting purposes.[38]

3. Discussion

40. We have concluded that it is appropriate to require a Statement of Cash Flows rather than the Statement of Changes in Financial Position originally proposed. The Statement of Cash Flows will replace the Statement of Changes in Financial Position in financial statements issued to the investment community for calendar year 1988. A Statement of Cash Flows has the advantage of a more refined focus on items which are usually a more accurate barometer of a company's ability to meet its obligations, distribute dividends, and make future investments.

41. Although SFAS-95 provides options for presentation of cash flows (*i.e.* direct method *versus* indirect method), we have decided, in the interest of uniformity and comparability, to specify a presentation approach. The information provided on this schedule will be used to make comparisons among carriers and to compile summaries of reported information. We believe our ability to use the information in these ways would be compromised unless a format is prescribed using a single presentation approach. Because, as USTA points out, most carriers have used the indirect approach, we have developed a schedule format which incorporates this approach and include it in Attachment B as Schedule B-2, *Statement of Cash Flows*. In certain circumstances we will accept the Cash Flow Statement contained in the SEC Form 10-K. These circumstances will occur when a carrier files its SEC Form 10-K on an operating company level, supplies a copy of their SEC Form 10-K filing and follows the indirect approach using the identical format shown on Schedule B-2 for its SEC Form 10-K. When this occurs the carrier need not complete the schedule but would annotate that it is identical to the Cash Flow Statement filed in its SEC Form 10-K.

E. ***Reporting of Investments and Receivables***

1. Proposal

42. In the *OIC*, we proposed to combine certain data contained on Schedule 17, *Investments*, Schedule 20, *Notes Receivable*, and Schedule 21, *Accounts Receivable*, into a single schedule identified as Schedule 17, *Receivables and Investments - Affiliated and Nonaffiliated Companies*. The revised Schedule 17 would require individual disclosure of investments in and receivables from all affiliates and eliminate individual reporting of receivables from nonaffiliates.

2. Comments

43. Ohio disagrees with the proposed consolidation. Ohio believes that valuable and necessary information would be lost if the three existing schedules were combined into one.[39] However, Ohio does not specifically mention what important information would be lost. NYDPS believes that this consolidation results in an overcrowded schedule that does not include essential information now being reported on the current Schedule 17.[40] The proposed schedule makes no distinction between permanent investments and advances; does not disclose earnings/losses of affiliates; nor does it disclose additions and dispositions during the year. In addition, NYDPS believes that the consolidation of Schedules 20 and 21 into one schedule would be acceptable only with the provision that activity data, rather than year end balances, become the focus of the new schedule. Because it does not focus on activity data, NYDPS believes that this schedule is inadequate to monitor the flow of funds between the regulated entity and its affiliates. NYDPS states that this is a concern that caused the Commission to restructure its accounting guidelines specifically to discourage such abuses.

44. NYDPS recommends that the Commission retain the existing Schedule 17, and modify it to show (a) the method of accounting for investments (cost or equity), (b) equity in the earnings of affiliates accounted for under the "equity method", and (c) dividends declared by affiliates being accounted for under the "equity method".[41] NYDPS further recommends that the receivables and allowance for uncollectibles on the proposed Schedule 17 be reported on a separate schedule and disaggregated between affiliated and nonaffiliated companies. In addition, NYDPS requests that receivables from nonaffiliates be separately identified for the ten largest accounts. NYDPS believes that this recommendation will ensure continuity between the data reported on Schedule 17 and the accounts receivable data on old Schedule 21. It further recommends that receivables data be revised to include the beginning balances, average month end balance outstanding, aggregate debit/credit activity, and ending balances for each affiliate, the ten largest nonaffiliates and all other nonaffiliates in the aggregate. NYDPS believes that this level of detail will highlight collection practices and potentially help reveal whether affiliates are receiving favorable treatment *vis - a - vis* nonaffiliates. NYDPS believes that this level of detail is necessary to satisfy the Commission's stated intent to deter cross-subsidies to affiliates and will improve the regulators' oversight capabilities.[42]

45. USTA asserts that NYDPS has sought more detail than what is contemplated for this schedule. USTA believes that its own proposal would achieve one end sought by the NYDPS, *i.e.*, the segregation of affiliate from non-

affiliate transactions.[43] Pacific Telesis contends that information on earnings and losses of affiliates is not necessary for the Commission to effectively monitor a company's rate of return, profitability, financial risk, and growth.[44] Pacific Telesis and BellSouth believe that information, such as earnings and losses of affiliates is proprietary and should not be available for public inspection.[45]

46. US West believes NYDPS performs a disservice by implying that an expansion of Form M is necessary to ensure that telephone companies are complying with the Commission's Part 32 rules on affiliate transactions. US West believes that the Commission's Joint Cost Proceeding adopted the necessary accounting safeguards in order to monitor compliance.[46] Ameritech contends that NYDPS is more concerned with monitoring the adequacy of the Commission's procedures to monitor compliance with its affiliate transactions rules than it is with the content of the Form M.[47] NYNEX contends that NYDPS would improperly burden Form M with information maintained and reported by carriers in other mechanisms already prescribed by the Commission.[48] BellSouth notes that existing Schedules 20 and 21 were both on an "end of period" basis and that activity underlying these schedules was never reported on the Form M schedules we proposed to replace.[49] Finally, BellSouth states that Part 32 of the Commission's rules does not require the disclosure of earnings or dividends of affiliates.[50]

47. USTA is concerned that on the proposed Schedule 17, the Commission is requiring the respondents to further subdivide nonaffiliates between those in which a carrier has an ownership interest and those in which a carrier does not.[51] USTA, BellSouth and SWB believe that such a subdivision goes beyond the scope of Part 32.[52] BellSouth and SWB also state that it does not presently require maintenance of the level of detail such a subdivision would require and suggests the requirements in the second and third sentences of Instruction 5 for the proposed Schedule 17 be omitted.[53] USTA suggests that the Commission establish a floor limit for reporting separate affiliate balances. It requests the Commission to set the limit at $1 million, an amount that represents, by definition, under 1 per cent of the gross operating revenues of the reporting carrier.[54] BellSouth also requests the Commission to require reporting of affiliate receivable balances only for amounts of $1 million or more.[55] Centel suggests that the threshold level for Schedule 17 should be $100,000.[56] AT&T believes the Commission should use the $1 million threshold suggested by USTA for separate reporting of affiliate balances in Schedule 17.[57]

3. Discussion

48. It is clear from the comments that modification of the schedule would yield substantial improvements and place the Commission in a better position to evaluate investments in affiliated companies. The overcrowding problems NYDPS suggests are easily overcome if the column headings and the line items are switched. We will require "equity method" affiliates and "cost method" affiliates to be reported in separate schedules identified as Schedules B-3a and B-3b. In the format we are prescribing, as many as nine affiliated companies can be accommodated on a single sheet of Schedule B-3a. As many as eight "cost method" affiliates would be reported individually and all nonaffiliated companies would be reported in the aggregate in the ninth column of Schedule B-3b.[58] Additional sheets may be used as necessary. This format will permit us to add individual lines for the equity in undistributed earnings or losses, preferred stock, and long-term debt as NYDPS has suggested for affiliates accounted for under the "equity method". Furthermore, the format will continue to provide us with the ability to relate this investment information with receivables, dividend and interest information, and temporary investments for a single affiliate, as we contemplated in the proposal.

49. We will not adopt the NYDPS suggestion to place information relating to notes receivable and accounts receivable on a separate schedule. The depth of a company's commitment to an affiliated company is not measured solely in terms of its investment in securities, but should also consider accounts and notes receivable and other temporary investments. We include this information on accounts and notes receivable and dividends from affiliates on Schedules B-3a and B-3b as shown in Attachment B. On Schedules B-3a and B-3b, we adopt the NYDPS suggestion to add information on gross debits and gross credits in notes and accounts receivable accounts and other asset accounts customarily used in transactions with affiliates (Accounts 1180, 1190, 1200 and 1210). We do so because it will be useful in determining the dollar volume of transactions taking place between the carriers and affiliated companies that would not be discernible from balances reported at year end. We do not include on this schedule information on related allowances for uncollectibles which will be reported on a separate schedule in the revised Form M Report.

F. *Assets Purchased From or Sold to Affiliates*

1. Proposal

50. In the *OIC*, we proposed to add Schedule 13C, *Analysis of Telecommunications Plant Purchased From or Sold To Affiliates* to assist the Commission in the monitoring of transactions between affiliates which are governed by rules established in CC Docket No. 86-111.[59] Specifically, this schedule was designed to collect separately, by affiliate, data on sales between the reporting company and its affiliates, which were included in Account 2001, Telecommunications Plant in Service, at any time during the year.

2. Comments

51. None of the commenting parties object to the addition of this schedule. However, several parties suggest expansion or clarification of the schedule. NYDPS maintains that this schedule lacks essential information on the nature of the transaction and the basis for determination of fair market value.[60] NYDPS recommends that the Commission modify the instructions and title of this schedule to require that all asset transfers, not just the transfer of telecommunications plant, should be reported. In addition, NYDPS recommends that (1) the schedule should be expanded to accommodate and identify the reporting of asset transfers recorded at tariff rates or prevailing prices as permitted in Section 32.27(b); (2) column (b) should be expanded to include a description of the asset; and (3) the source of the information reported in the column for fair market value, should be provided in a footnote reference. Ohio suggests that column (e) --Other -- as well as column (g) -- Fair Market Value -- be

explained by footnote.[61] Finally, Centel requests a clarification of the instructions for this schedule to explain exactly which transactions are to be included.[62]

52. Several carriers in their reply comments rebut NYDPS's suggestions for additional data on this schedule. Ameritech and BellSouth state that carriers already file information concerning the nature, terms and frequency of transactions with affiliates in their cost allocation manuals.[63] Further, BellSouth states that the attestation audit reviews required by the Commission will ensure compliance with these methods.[64] USTA also maintains that information to be provided on the schedule should be limited to Account 2001, Telecommunications Plant in Service.[65] USTA claims that the inclusion of "all asset transfers" in this schedule as requested by NYDPS would encumber the Commission's ability to monitor other plant asset transfer. Finally, AT&T asserts that NYDPS provides no support as to how this additional information would serve any of the Commission's regulatory purposes.[66]

3. Discussion

53. We have considered NYDPS's suggestions that this schedule be expanded to include all asset transfers and services between affiliates. We believe reporting of services provided and received goes beyond what could be accommodated on the proposed schedule. Proposed Schedule 13C is geared toward obtaining data on asset transfers, in the aggregate, by account. Since this is the case, we will not adopt any suggestion to expand it to cover services. We will consider the reporting of services in our discussion of proposed Schedule 43. We will also not require on this schedule reporting of the basis for the determination of the fair market value since, as a practical matter, purchases involving a particular account may involve many different sources for determinations of fair market value. We will not modify the Form M reporting to such an extent that it would include data related to individual transactions. It was intended instead to provide an overview of the nature and volume of plant and equipment being transferred.

54. While much of the NYDPS and Ohio suggestions go beyond what was initially proposed and will not be adopted here, [67] we do adopt the suggestions to expand the schedule to include all asset transfers because it would provide useful information. It will enable us to compare actual activity with the general information contained in cost allocation manuals. We therefore, redesignate proposed Schedule 13C as Schedule B-3c and revise the title and instructions to include all asset transfers by account. We do not believe such an expansion will be unduly burdensome or hamper our ability to monitor other plant sales and purchases.

G. *Uncollectible Accounts*

1. Proposal

55. In the *OIC*, we proposed to require carriers to report on Schedule 21 data relating to activity during the year in Account 1181, Accounts Receivable Allowance-Telecommunications, and Account 1191, Accounts Receivable Allowance-Other. The proposed schedule generally followed the same format as old Form M Schedule 21A, *Reserve for Uncollectible Accounts*, but data for Accounts 1181 and 1191 were to be reported in separate columns to distinguish between telecommunications receivables and other receivables.

2. Comments

56. In its comments in connection with Schedule 17 (Section V-E of this Order), NYDPS expresses a concern over possible discriminatory treatment with respect to amounts due from affiliates *vis - a - vis* amounts due from others and suggests that reporting of uncollectibles parallel reporting of receivables on a different schedule. NYDPS also recommends that the proposed schedule on uncollectibles be renumbered so as not to be confused with old Form M Schedule 21, which dealt with receivables.[68]

3. Discussion

57. In our earlier discussion of proposed Schedule 17, we conclude that data on receivables from affiliates and nonaffiliates should be reported on the Schedules B-3a and B-3b we finally adopt, and that data on allowances for uncollectibles would be included on a separate schedule. We agree with NYDPS that there should be a parallel between reporting of receivables and reporting of allowances for uncollectibles. We therefore expand the schedule on allowances for uncollectibles to include allowances for notes receivable reported on Schedules B-3a and B-3b. We will not further subdivide the columns to distinguish between affiliates and nonaffiliates. The schedule does, however, require carriers to disclose at the bottom of the schedule the portion of any accrual reported on line 2 that is attributable to affiliate receivables. It also requires at the bottom of the schedule disclosure of any affiliate receivables written off during the year. Receivables due from affiliates could otherwise be written off during the year without disclosure. The schedule we adopt with respect to uncollectibles is incorporated in Attachment B as Schedule B-4.

H. *Telecommunications Plant in Service Retired*

1. Proposal

58. In the *OIC*, we proposed to bring Schedule 12B forward from the old Form M. This schedule shows the accounts involved in recording retirement entries broken down between plant sold with traffic and other plant retired. The schedule is useful in determining amounts charged to accumulated depreciation and amortization accounts, and other accounts used to record "above the line" and "below the line" gains or losses.

2. Comments

59. USTA comments that proposed Schedule 12B is redundant because, for the most part, it will duplicate information already reported on other schedules. According to USTA, this will occur because the amounts reported are almost entirely composed of depreciation charges, which would be reported in the proposed Schedule 14A, *Analysis of Entries in Accumulated Depreciation* or in the format we prescribe for balance sheet accounts.[69]

3. Discussion

60. Contrary to USTA's comments, this schedule would not be redundant with the format we have prescribed for the balance sheet accounts (ARMIS USOA Report) since that format makes no distinction between plant sold with traffic and other plant retired. Moreover, the retirements reported in the ARMIS USOA Report do not match the debits and credits in all of the accounts involved in recording the retirements. While it is true that most charges will involve the accumulated depreciation accounts, many do not, and the purpose of this schedule is to give a complete picture of the distribution of these charges, which may receive different treatment for ratemaking purposes. Finally, as will be discussed later, we have amended our proposed Schedule 14A, *Analysis of Entries in Accumulated Depreciation* to eliminate breakdowns between plant sold with traffic and other plant retired. Thus, no redundancy will occur with respect to this schedule and proposed Schedule 14A. For these reasons we include the proposed Schedule 12B in Attachment B, but redesignate it as Schedule B-5a.

I. *Depreciation Schedules*

1. Proposal

61. In the *OIC*, we proposed gathering detailed depreciation data on two schedules. These schedules were proposed as Schedule 14A, *Analysis of Entries in Accumulated Depreciation* and Schedule 14C *Bases of Charges for Depreciation*. As proposed, Schedule 14A was a detailed eight-page analysis of changes in accumulated depreciation during the year. Starting with accumulated depreciation balances for each plant in service account at the beginning of the year, it would show increases and decreases during the year and would provide detailed information on components of decreases related to plant sold with traffic and other plant retired. Separate schedules would be filed on a state-by-state basis and for the overall (company-wide) operations of the carrier.[70] Proposed Schedule 14C was to provide information on depreciation methods, depreciable lives, reserve percentages and depreciation rates by account for the different classes and subclasses of depreciable plant. As with Schedule 14A, we proposed that carriers provide separate schedules on a state-by-state basis for each state in which the carrier operates and for company-wide operations. Both schedules followed the format of schedules in the existing Form M, but in the existing Form M, these schedules are required on a company-wide basis only.

2. Comments

62. *Schedule 14A*. SWB, NYNEX, GTE, US West, USTA, and BellSouth believe that reporting of information in this schedule should be at the company-wide level. They believe that reporting this information on a state-by-state basis as well as for company-wide operations dramatically increases the reporting burden.[71] SWB in its reply comments holds that the state-by-state data requirements for Schedule 14A should be eliminated since the reporting on this schedule on a state-by-state basis has no apparent purpose.[72] AT&T believes that requiring carriers to provide state-by-state disaggregations of depreciation is of questionable value because in setting rates the Commission uses nationwide projection lives and the accounting practices of many state commissions differ greatly from the accounting practices of the Commission. AT&T also believes that disaggregating data on a state-by-state basis would impose especially onerous reporting obligations in its case.[73]

63. In contrast, Ohio supports state-by-state reporting but believes that "jurisdictional" and "nonjurisdictional" data should be reported separately.[74] In its reply comments, Ameritech says it is unclear what Ohio means by "nonjurisdictional" data and expresses support for reporting combined interstate and intrastate data in each jurisdiction.[75] Finally, USTA, in an Attachment to its comments, offers extensive editorial suggestions, the most notable of which are the elimination of separate detailed data on plant sold with traffic and other plant retired, and the combination of "other charges" and "other credits" into a single column.[76]

64. *Schedule 14C*. For the most part commenting parties support reporting of proposed Schedule 14C on a state-by-state basis, but question the necessity of company-wide information in the performance of our regulatory activities.[77] These parties point out that rates are set on a state-by-state basis and company-wide rates are not meaningful. In contrast, US West believes proposed Schedule 14C should be filed only at a company-wide level and sees no need for state-by-state data because the Commission receives very detailed information from the companies for triennial reviews and for any technical updates.[78] AT&T believes it should be permitted to provide Schedule 14C on a company-wide basis because the Commission prescribes AT&T's depreciation rates using nationwide projection lives.[79] Bell Atlantic and USTA believe the instructions should be modified to make it clear that only interstate depreciation rates should be shown on Schedule 14C,[80] and Ameritech suggests that the instructions be modified to make clear that the accumulated reserve percentages, rather than any modified, theoretical or adjusted percentage shall be reported.

3. Discussion

65. We review depreciation studies and set depreciation rates for local exchange carriers on a state-by-state basis. Except for updates, the rates for these carriers are reviewed on a three-year rotating basis. Periodic represcriptions of depreciation rates also apply to AT&T's interexchange companies individually.[81] In between the scheduled reviews, the state-by-state depreciation data we envisioned would provide useful information in a consistent format for analytical purposes and be useful in communicating with state commissions on depreciation matters. However, in light of the comments, we conclude that our immediate needs could be met in the least burdensome way by having carriers report the data we proposed for Schedule 14A on a company-wide basis[82] and limit the state-by-state reporting to the data we proposed for Schedule 14C. In the revised Form M shown in Attachment B, we require Schedule B-5b, *Analysis of Entries in Accumulated Depreciation* to be filed on a company-wide basis.

66. In the interests of minimizing Form M reporting burdens, we also adopt USTA's suggestion to eliminate the separate detailed reporting of plant sold with traffic and other plant retired on Schedule B-5b. Our review of the Form M Reports filed in recent years reveals that the columns for plant sold with traffic are used infrequently. Our earlier decision to have this information reported on new Schedule B-5a, *Analysis of Telecommunications Plant in Service Retired*, will provide us with a trigger for fur-

ther inquiry should the need for more detailed information arise. We believe this would be preferable to requiring recurrent submission of those pages with columns for plant sold with traffic that would be unpopulated with data. This decision will enable us to eliminate column (g) on pages 2 and 6 of the eight-page schedule we originally proposed. Elimination of columns used to summarize amounts reported in other columns (for example, column (e) for total credits and column (j) for total charges) will enable us to accommodate on 2 pages what had been proposed for pages 1 and 2, and 5 and 6. The decision to eliminate details on plant sold with traffic will enable us to eliminate pages 3 and 7. These changes and others of a relatively minor editorial nature will leave the four-page schedule shown as Schedule B-5b in Attachment B.

67. Information we proposed for Schedule 14C is to be reported on Schedule B-5c as shown in Attachment B. We require reporting for this schedule on a state-by-state basis but not on a company-wide basis. In contrast with the original proposal, Schedule B-5c has additional columns for depreciation expense broken down between the regular depreciation expense and the portion attributable to the amortization of reserve deficiencies and (3) for the average plant balance and the composite rate. In changing the reporting instructions, we clarified the point raised by Ameritech as to what should be included in accumulated depreciation percentages. In response to Bell Atlantic's and USTA's suggestions, the instructions for this schedule will also make clear that the depreciation rates reflect the rates prescribed by this Commission. AT&T's comment that the use of nationwide projection lives negates the value of this schedule is without merit. Even though nationwide projection lives are used in setting rates, our periodic represcription of depreciation rates applies to AT&T's interexchange companies individually, and we expect the results reported on Schedule B-5c by AT&T will differ from state to state.

J. *Property Held for Future Use*

1. Proposal

68. In the *OIC*, we proposed to bring existing Schedule 12C, *Analysis of Entries in Property Held for Future Telephone Use* forward into the revised Form M. Like its Part 31 predecessor, the proposed schedule would disclose the original cost of property owned and held for no longer than two years for future use in telecommunications services. The schedule would be used to monitor the Commission's rate base rules under Part 65[83] and provide, with respect to items amounting to $100,000 or more, information on initial recording dates, additions, retirements, and transfers and adjustments that exceed $5,000.

2. Comments

69. USTA suggests that this schedule can be eliminated because a summary level of the detail to be reported would be included on the proposed balance sheet (ARMIS USOA Report). If the schedule is retained, USTA urges that limits for individual items to be reported be raised from the proposed $100,000 to a threshold of $1 million or more.[84] USTA believes a new higher limit would be more in keeping with higher prices for properties normally reported on this schedule. USTA also believes that in conjunction with raising the limit for individually reported items, the limit for reporting individual adjustments and transfers should be raised from $5,000 to $250,000.[85]

3. Discussion

70. This schedule is needed for rate base monitoring purposes. This cannot be accomplished from the summary level reported in the ARMIS USOA Report, which does not include information with respect to how long an item has been held in the account, or information on transfers or adjustments. Thus, we include the data proposed for Schedule 12C in Attachment B as Schedule B-6a. In the new Schedule B-6a we do not adopt USTA's suggestion to raise the threshold for items to be individually reported to $1 million, since our own review of Form M indicates that few, if any items would be reported if the threshold is raised to that level. However, our change does include a higher limit for the reporting of transfers, adjustments and corrections because we believe a $10,000 limit bears a more appropriate relationship (10 percent) to the items to be reported individually. Our main purpose here is to avoid unnoticed reclassifications and adjustments, which could be used as a mechanism to hold dollars in this account beyond the time limits prescribed in Part 32. We believe a $10,000 limit is sufficient for that purpose.

K. *Plant Acquisitions and Plant Acquisition Adjustments*

1. Proposal

71. In the *OIC*, we proposed Schedule 13A, *Analysis of Telecommunications Plant Acquired*, which would show property acquisitions including the acquisition expense. It would also show the disposition of the amounts initially recorded in Account 1439, Other Deferred Charges, and subsequently transferred to plant or expense accounts. We also proposed Schedule 13B, *Analysis of Telephone Plant Adjustment*, which would continue our ability to analyze adjustments that are recorded when plant is acquired from another carrier at a price in excess of the net book value of the plant on the books of the carrier from which it was acquired.

2. Comments

72. USTA urges the elimination of proposed Schedules 13A and 13B.[86] USTA notes that 47 C.F.R. Section 32.2000(b)(4), requires carriers to submit for Commission consideration and approval the journal entries made to record acquisitions of plant in excess of $1 million. USTA also notes that summary totals on additions, retirements and transfers are summarized in balance sheet accounts reported in the ARMIS USOA Report. USTA indicates these would include major acquisitions recorded on proposed Schedules 13A and 13B.

3. Discussion

73. As proposed in the *OIC*, Schedule 13A, *Analysis of Telecommunications Plant Acquired*, requires respondents to report separately each plant acquisition for which an amount was included in Account 1439, Other Deferred Charges. Schedule 13B, *Analysis of Telephone Plant Adjustment*, requires respondents to report additions to and reductions from Account 2005, Telecommunications Plant Adjustment. Upon further examination, we conclude that proposed Schedule 13A is not necessary since

amounts recorded in Account 1439 are not included in the rate base until they are transferred to telecommunications plant accounts. When they are transferred to plant accounts, they are reported by account on Schedule B-1. Thus, we are not requiring the proposed Schedule 13A. We will however, continue to need the information concerning telecommunications plant adjustments proposed to be reported on Schedule 13B. This schedule tracks amounts recorded in Account 2005 to their ultimate disposition. This cannot be accomplished using the journal entries on acquisitions which carriers submit under the requirements of Section 32.2000(b)(4). Because this Commission has historically held that telecommunications plant adjustments should not be allowed in the rate base unless a carrier can specifically justify the amounts, it is important that we receive an analysis of the activity in Account 2005 provided by Schedule 13B. Therefore, we retain Schedule 13B but in keeping with the new schedule numbering system we redesignate it as Schedule B-6b.

L. *Capital Leases*

1. Proposal

74. In the *OIC*, we proposed a new Schedule 12D, *Capital Leases*. For capital leases, the proposed schedule would require disclosure of the capitalized amounts, the accumulated amortization, the lease obligation broken down between current and noncurrent amounts, and a breakdown of lease cost components expensed during the year (amortization, interest, and other expenses borne by the lessee).

2. Comments

75. USTA notes an apparent contradiction in the proposed reporting instructions which makes it unclear whether data on capital leases should be reported at the account level or by plant category. USTA believes that such detail is not required to be maintained under Part 32 of the Commission's rules at the account level or by plant category. Further, USTA asserts that no useful purpose would be served by reporting related expenses at the account level or by plant category and, in addition, suggests the deletion of the columns requiring disclosure of lease cost components expensed during the year.[87] BellSouth states that its capital leases are detailed by broad plant categories and not at the account level. BellSouth further states that the data proposed for lease obligations and lease cost components are available only in total and are not available by plant category or plant account level.[88] Centel also believes that the USOA does not require recordkeeping by class of plant.[89] Both Centel and BellSouth claim that providing such detail will create a significant additional accounting and reporting burden and Centel suggests that we eliminate this schedule. NYDPS favors classification of capital leases by account. NYDPS asserts that leased plant has the same characteristics as owned plant and should be reported at the same level of detail as owned plant at the account level.[90] Ohio supports adoption of Schedule 12D, as proposed.[91]

76. In reply, USTA contends that there is no need for the level of detail NYDPS suggests,[92] and NYNEX asserts that NYDPS has not demonstrated any benefits which would overcome the additional burdens of the increased reporting.[93]

3. Discussion

77. At the time Part 32 was adopted, investments in capital leases were not expected to constitute a significant portion of the carriers' rate base.[94] However, there are indications from Tariff Review Plans filed with the Commission that capital lease activity, as an alternative means of financing the acquisition of assets, is expanding.[95] For this reason, we find it necessary to obtain more detail regarding the investment in capital leases.

78. Leases are capitalized because they result in the acquisition of assets through transactions that are comparable to purchases. When viewed in that context, the assets acquired under capital leases should be distinguished from one another in a manner that is similar to owned property and equipment. The original intention was to have capital leases reported by plant category. The instructions did not, however, define the term plant category. In order to clarify what was intended for the purposes of reporting on proposed Schedule 12D, we will require reporting at the Class B account level prescribed in Section 32.2000 (j) for Accounts 2110 through 2410. This does not seem to be an overly burdensome requirement since for separations purposes, Account 2681, Capital Leases, is required to be separated on the basis of like owned equipment or by special study.[96] The fact that Part 32 does not explicitly require parallel distinctions for property under capital leases is irrelevant. Over the years we have frequently obtained detailed data in Form M, which has not been the subject of explicit segregations in Part 31.

79. With respect to the reporting of lease obligations and annual lease cost components, several parties suggest that this information be reported in the aggregate for all capital leases because it would be a burdensome requirement to relate the portion of the schedules dealing with the future obligations to particular asset categories. There are two steps involved here. The first step is the process of sorting capital leases by plant category, in this case at the Class B account level. The second step is the process of relating the liability and annual expenses to the particular leased assets. Fundamental logic suggests some relationship should already exist. It is difficult to perceive carriers not establishing a relationship between particular leased assets and periodic lease payments. If such a relationship does not exist, it should be established. We therefore do not delete the columns provided for lease obligations and annual lease cost components as USTA and others have suggested. We will adopt the schedule as it was proposed, but redesignate it as Schedule B-7 with appropriate amendment of the instructions for clarifying the degree of segregations.

M. *Deferred Charges and Deferred Credits*

1. Proposal

80. In the *OIC*, we proposed bringing these schedules forward from the old Form M Report. On proposed Schedule 22 respondents would report individual items and amounts recorded at the end of the year in Account 1438, Deferred Maintenance and Retirements and Account 1439, Other Deferred Charges, when the amount of the item is $100,000 or more. All other items would be reported in the aggregate. On proposed Schedule 30A, respondents would report individual items and amounts recorded at the end of the year in Account 4360, Other

Deferred Credits, when the amount of the item was $1 million or more. All other items would be reported in the aggregate.

2. Comments

81. SNET and USTA note that these schedules cover balance sheet counterparts and that there is an inconsistency in thresholds for reporting individual items. Both SNET and USTA recommend that the limitation for individually reported items on proposed Schedule 22 be raised to match the $1 million threshold for proposed Schedule 30A.[97]

3. Discussion

82. We proposed to retain the $1 million reporting threshold for deferred credits reported on proposed Schedule 30A because at this level carriers would be relieved from reporting numerous items of little consequence. At the same time, the Commission would be provided with a fair presentation of the consequential items.

83. We believe the same results can be achieved for deferred charges and on the schedule we finally adopt as Schedule B-8 we revise the instructions to require the carriers to report only those items which amount to $1 million or more at year end. Thus the reporting threshold for deferred charges reported on Schedule B-8 and deferred credits reported on Schedule B-13 as shown in Attachment B are the same. We will also restrict reporting on new Schedule B-8 to items recorded in Account 1439 since items recorded in Account 1438 are not items of the type customarily included among deferred charges.

N. *Accounts Payable*

1. Proposal

84. In the *OIC*, we proposed to bring forward from the old Form M report, with some modifications, Schedule 29. This schedule detailed the list of the ten largest items recorded in Part 31, Account 159.1, Accounts Payable, to Affiliated Companies, and Account 159.2, Other Accounts Payable, that amount individually to $1 million or more. In Part 32, Account 4010 is used to record all amounts currently due to others for recurring trade obligations and amounts due arising from sharing of revenues. This account requires subsidiary record categories for payables to affiliates and nonaffiliates. Similar to the old schedule it would replace, the reporting threshold for nonaffiliates would be the ten largest items amounting to $1 million or more. However, with respect to affiliates, we modified the instructions so that all payables balances at the end of the year would be reported for each affiliate.

2. Comments

85. NYDPS suggests that this schedule should reflect a beginning balance, aggregate charges and credits during the year, and the ending balance for each affiliate and each other large creditor. NYDPS believes that this request can be accommodated by expanding the number of columns and by modifying the instructions. If this information cannot be provided, NYDPS urges the Commission to more clearly specify in the reporting instructions that all affiliate payables are to be listed.[98] AT&T disagrees with the NYDPS recommendation because it asserts that these data will not serve any of the Commission's regulatory purposes and NYDPS did not provide any explanation on how it would serve those regulatory needs.[99] Centel believes that increasing the reporting threshold to $100,000 (presumably for affiliates) would simplify the reporting of data on this schedule.[100]

3. Discussion

86. We agree the NYDPS suggestion would yield information which would be useful in monitoring accounts payable with affiliates. We believe that the information developed from disclosure of beginning balances, gross debits and gross credits would enable us to compare activity volume with data on assets acquired from affiliates, which are to be reported on Schedule B-3c, and services provided that are to be reported elsewhere in the Form M (*See* Attachment B, Schedule I-3). In the schedule we adopt as Schedule B-9, *Accounts Payable*, we adopt the NYDPS suggestion to obtain activity information. We also require reporting of all balances with affiliates, and do not limit it to the ten largest amounts. Reporting on nonaffiliate payables is unchanged from the proposal.

O. *Capital Stock and Long - Term Debt*

1. Proposal

87. In the *OIC* we proposed that data relating to long term debt and capital stock be reported on three schedules. On proposed Schedule 23, *Capital Stock*, we would obtain data on the class of stock, number of shares authorized and outstanding, additional paid in capital, and treasury stock.[101] On proposed Schedule 24, *Long - Term Debt*, carriers would disclose, with respect to each issue, the issue dates, maturity dates, face amounts outstanding, details on related unamortized discounts and premiums and interest rates. On proposed Schedule 26, *Capital Stock and Funded Debt Reacquired or Retired*, we would obtain information on securities reacquired and retired, which would include data on reacquisition costs. In proposing these schedules, we also proposed the elimination of existing Schedule 25, *Capital Stock and Funded Debt Issued or Assumed During the Year*.[102] Information reported on that schedule that was still needed for regulatory purposes was covered in proposed Schedules 23 and 24.

2. Comments

88. *Long - Term Debt*. NYDPS states that the Commission should clarify why the Schedule 24 heading identifies Account 4250, Obligations Under Capital Leases, since it appears the Commission intended to report data on capital leases on proposed Schedule 12D, *Capital Leases*. NYDPS also believes that the instructions and column headings should distinguish between premium and discount amounts. NYDPS further states that the instructions are confusing and the results reported in columns distinguishing between long-term and short-term portions will not be particularly useful for analytical purposes. NYDPS also believes the terms "stated rate" and "yield rate" should be defined in the instructions.[103] USTA believes the schedule heading should be revised; column (d) for reporting the face amount outstanding should be expanded to two columns for the long-term and short-term portions; the last two columns should be deleted; and the instructions should be revised accordingly.[104]

89. *Capital Stock and Funded Debt Reacquired or Retired.* NYDPS believes that proposed instructions relegate essential information to footnote explanations while excessive column space is designated for reporting the effective date of call and remarks. NYDPS also believes a column should be provided to report the amortization period for reacquisition costs. NYDPS also states it appears the Commission is narrowly defining reacquisition costs as the face amount of the security plus any call or tender premiums. NYDPS believes the cost of reacquisition reported in columns (b) and (c) of the proposed schedules should also include brokers' fees and retirement of any unamortized debt discount or premium, and issuance expenses on the old debt.[105] USTA states that it sees no reason to make the changes requested by NYDPS because the information sought by NYDPS will still be provided.[106]

3. Discussion

90. *Long - Term Debt.* Since we have decided to adopt a new schedule for capital leases, we delete from the long-term debt schedule we adopt here as Schedule B-10, the information on capital lease obligations. In the new Schedule B-10 we adopt, we incorporate the editorial improvements suggested by both NYDPS and USTA, as modified and shown in Attachment B.

91. *Capital Stoek and Funded Debt Reacquired.* In the schedule we incorporate in Attachment B as Schedule B-15,[107] we have modified the proposed schedule to provide additional room in the remarks column for information NYDPS believes would have been relegated to footnote type disclosure. With respect to the NYDPS comment on reacquisition costs, we call NYDPS's attention to columns provided for reacquisition expense, which includes the types of expenses NYDPS describes and that the revised Schedule B-10, *Long - Term Debt* includes a column for unamortized debt issuance expenses.

P. ***Deferred Taxes***

1. Proposal

92. In the *OIC* we proposed one income tax schedule for reporting changes in deferred operating income taxes (Schedule 30B) and one for reporting changes in deferred nonoperating income taxes (Schedule 30C). Each schedule was divided into sections applicable to property related and nonproperty related deferrals. Column headings began with the balance at the beginning of the year and progressed through current accruals, current amortizations, and adjustments to arrive at the balance at the end of the year. The instructions also required a separate explanation of adjustments amounting to $100,000 or more.

2. Comments

93. USTA suggested that on both schedules, the column headed current year amortization be deleted. USTA alleges that side records would be needed to track the amortizations because Part 32 accounts reflect the net of accruals, amortizations, and adjustments. USTA also suggests that instructions for the schedule be modified so that carriers are required to explain only those adjustments exceeding $1 million. USTA believes the $1 million threshold is not an unreasonable limit in view of the fact that any reporting company has operating revenues in excess of $100 million.[108] NYDPS generally asserts that the information that we propose to collect on income tax calculations is inadequate, but does not say why this would be so.[109]

3. Discussion

94. We will not adopt USTA's suggestion to delete the column disclosing the current year amortization. While it is true that the account balance at year end will reflect the beginning balance plus or minus the net change during the year, USTA's comment is of little relevance. Whether the journal entries record gross debits and gross credits separately, or merely the net of the two, the amounts of the originating differences (current year accruals) and the amounts of the reversing differences (current year amortization) must be calculated and supporting documentation retained. Whichever way the carriers accomplish the correct year-end balances, we are merely requiring on the schedule, data which the carriers must have in order to yield the proper deferred tax balances at the end of the year.

95. The proposed $100,000 threshold for explanation of adjustments on Schedules 30B and 30C is considerably higher than the $25,000 threshold on the old Form M Schedules 30B and 30C the proposed schedules would replace. We believe the $100,000 threshold is adequate. It represents an increase over what was previously required, which we thought struck an appropriate balance between the burden such a requirement would impose and the potential importance of the adjustment. The importance of these adjustments should not be weighed against the total annual revenues as USTA suggests, but against their impact on net changes in the deferred tax balances during the year. These net changes are substantially lower than the $1 million threshold USTA suggests.[110] Therefore, we will not adopt this USTA suggestion.

96. In proposing these schedules, we did not require carriers to disclose the individual components of nonproperty related deferrals (items other than accelerated depreciation). There were two reasons for this. First, the new Part 32 requires comprehensive interperiod tax allocations for the tax effects of all material tax timing differences. This would result in a substantial increase in the number of items to be individually reported over what has been reported in the past. Second, Commission staff is evaluating recent changes in generally accepted accounting principles, which if adopted by the Commission, could result in the introduction of new accounts and specific instructions for the treatment of items within those accounts. As a result, the schedules we proposed in September and adopt here could require additional changes in the future. Thus, we conclude that at this time the appropriate course is not to adopt any additional individual reporting requirements of component items and to adopt the schedules originally proposed designating them as B-11 and B-12 as shown in Attachment B.

Q. ***Special Expenses Attributable to Formal Regulatory Cases***

1. Proposal

97. In the *OIC*, we proposed to retain reporting of special expenses attributable to regulatory cases. The carriers would report expenses associated with individual regulations, hearings, and cases when the total expenses

applicable to an individual regulation, hearing, or case before federal, state, and other regulatory commissions was $10,000 or more.

2. Comments

98. USTA suggests that this schedule be deleted because the value of the information is negligible and because the compilation of this data is time consuming and burdensome. If the Commission determines that this schedule is to be retained, USTA requests the reporting threshold be raised to $100,000 or more.[111]

3. Discussion

99. In a 1985 review of Form M reporting,[112] this Commission decided to retain this reporting because it determined that the schedule provided valuable information on the cost of regulation. In addition, we decided not to increase the reporting threshold. We still find this schedule to be a valuable source for determining the magnitude of selected regulatory costs. Therefore, we incorporate this reporting in the revised Form M as Schedule I-2.

R. ***General Services and Licenses***

1. Proposal

100. In the *OIC*, we proposed reporting of data relating to payments to affiliates for services received under license agreements, service contracts or other assignments. The reporting on proposed Schedule 41 would disclose each affiliate to whom the respondent paid $100,000 or more, the nature of the service provided and the amount.

2. Comments

101. NYDPS believes a new schedule should be added because the proposed Schedule 41 is not sufficiently detailed to permit a determination of compliance with the Commission's affiliate transaction rules. Information should be added to indicate the basis for the valuation of the services.[113] Most carriers believe Schedule 41 should be deleted.[114]

3. Discussion

102. The purpose of this schedule is to identify the affiliate, the service provided and the amounts involved and thereby provide an indication as to what services are being provided and the volume of activity. This information will be used as a basis for comparison with Cost Allocation Manuals and closer examination by FCC audit staff, if necessary. We will not adopt the NYDPS suggestion to add valuation basis information to the Schedule I-3 we adopt as a part of Form M since it would likely involve addressing individual transactions and this goes beyond the scope of what can be accomplished in this simple form without the imposition of substantial additional burdens.

S. ***Pension Reporting***

1. Proposal

103. In the *OIC*, we proposed to eliminate Schedule 60A, *Relief and Pensions* and Schedule 60B, *Pension Cost Paid*, and replace these two schedules with a new schedule. The new schedule would disclose the status of benefit obligations and the value of pension assets along with major components of annual pension cost calculations (net periodic pension costs) and the distributions of these costs in the accounts.

2. Comments

104. Ohio agrees with the elimination of the existing schedules. No other parties commented specifically on the elimination.

105. Most of the parties commenting on the replacement schedule (proposed Schedule 60), except Ohio, urge reporting of pension plan status and the various components of the net periodic pension cost calculation at the plan administration level rather than the operating company level. USTA asserts that most plans are administered at the holding company level and, as a result, most of the information is available only at the holding company level.[115] Ameritech and several others also suggest that the schedule be subdivided and instructions be modified to report the plan status and net periodic pension cost calculations at the plan administrative level and the remaining information on contributions, disposition of the pension cost dollars and employee counts at the operating company level.[116]

106. USTA and several others also suggest that if the plan level is acceptable, the proposed schedule could be eliminated and the Commission could rely on information provided in SEC Annual Report Form 10-K.[117] Ohio suggests that an additional column be added on the proposed schedule to reflect the net change between the current year and the preceding year.[118] NYNEX opposes Ohio's suggestion because it is burdensome and unsupported and USTA believes that even the column in the proposed schedule for the preceding year is unnecessary.[119]

3. Discussion

107. Since the comments indicate no specific objection to the elimination of these schedules they are not included in Attachment B and are no longer a part of the Annual Report Form M. To the extent the information contained on Schedules 60A and 60B remains necessary for regulatory purposes, we include it in a replacement schedule as originally proposed.

108. In light of the comments on the proposed schedule, we conclude that it would be appropriate to divide the schedule into two sections and amend the reporting instructions to make clear the section of the schedule that we apply at the plan administration level and the section that we apply at the reporting company level. In order to establish the relationships between the employees of the reporting company and the total number of employees covered by the plan, we add lines at the bottom of each section of the schedule we adopt as Schedule I-4, *Pension Cost*. The instructions are amended accordingly.

109. We do not think it burdensome to have the preceding year column included on the schedule since it facilitates analysis of the interrelated items such as the pension cost and the actual contribution and the accumulated pension asset or liability in a convenient way. We do not believe it necessary to add a net change column as Ohio suggests. The process of determining the net change is something that can easily be performed by any user of the schedule. Even though 1988 will be the first year carriers were required by the new Part 32 to use new

pension accounting standards put in place since the old schedules were adopted by the Commission, we require the previous year column to be completed in the first report of the calendar year ended December 31, 1988. This should not be unduly burdensome because companies were required under generally accepted accounting principles to adopt the new standards for published financial statements issued to the investment community beginning with 1987 reports.[120]

T. *Tax Expenses*

1. Proposal

110. In the *OIC*, we proposed to bring forward from the existing Form M four schedules relating to taxes. The proposed schedules (36A, 36B, 36C, and 36D) dealt with Federal income taxes, prepaid taxes and accruals, excise taxes and other operating taxes. Proposed Schedule 36A would disclose details pertaining to taxes recorded in Account 7240, Operating Other Taxes. These would include items such as property, gross receipts, and capital stock taxes by jurisdiction. Proposed Schedule 36B would disclose details on prepaid taxes recorded in Account 1300, Prepaid Taxes and accruals recorded in Account 4070, Income Taxes Accruals, and Account 4080, Other Taxes Accrued. Proposed Schedule 36C, would disclose Federal income tax expenses recorded in operating and nonoperating expense accounts. Proposed Schedule 36D would disclose excise taxes collected from users of the reporting carriers' services as reported to the governmental bodies for whom the taxes were collected.

2. Comments

111. USTA suggests that Schedule 36A dealing with other operating taxes and 36C dealing with Federal income taxes can be eliminated because it duplicates information on other schedules. USTA does not see any regulatory benefit from reporting excise taxes collected from others because it details flow-through items, which are collected by the respondent and are remitted to the appropriate governmental agency.[121] For Schedule 36B dealing with prepaid taxes and accruals USTA believes that the requirements to explain adjustments amounting to $25,000 or more should be increased to $1 million or more.[122] AT&T also comments on these schedules staying that the Commission should grant proprietary protection for the tax data on Schedules 36A, 36B and 36D. AT&T asserts that this tax data would allow competitors to calculate AT&T's revenues by state and thus learn which markets are most profitable for AT&T.[123]

3. Discussion

112. We agree with USTA's comment that the schedule relating to Federal income tax expenses can be deleted. The data that would be reported on this schedule will be available on Schedule I-1, *Income Statement Accounts*. Detail on other operating taxes, prepaid taxes and excise taxes is not available elsewhere in the Form M. Most of the remaining data has been useful to the Commission in tracking tax expenses. In Attachment B, we adopt Schedule I-5a, *Other Operating Taxes;* Schedule I-5b, *Prepaid Taxes and Accruals;* and Schedule I-5c *Excise Taxes Collected From Users of Respondent's Services*. These schedules reflect some modification in the interests of reducing reporting burdens. The most notable of these modifications is the elimination of requirements to report taxes billed to others and taxes billed by others on Schedule I-5a. This will eliminate any need to trace taxes related to rented property. The second modification will raise the threshold for the requirement to explain adjustments on Schedule I-5b to $100,000. This will make the threshold consistent with those imposed for the schedules we adopted for the reporting of deferred taxes.

U. *Special Charges, Advertising, and Membership Fees and Dues*

1. Proposal

113. In the *OIC*, we proposed three separate schedules for reporting of special charges (Schedule 38), advertising expenses (Schedule 40), and membership fees and dues (Schedule 42). Reporting of these types of expenses are of importance in distinguishing allowable expenses for ratemaking purposes.

2. Comments

114. USTA urges that membership fees and dues be reported on the schedule proposed for special charges since the membership fees and dues recorded "below the line" are already included in Part 32 Account 7370, Special Charges.[124] If this is done, USTA believes the separate schedule for advertising expenses can be eliminated because the other items reported on the schedule proposed for advertising expenses can be determined from the Income Statement Accounts (Schedule I-1, Attachment B), or by special inquiry.[125]

115. USTA, AT&T, and Contel believe the threshold for reporting items individually on the schedule for special charges should be $100,000 or more instead of the $25,000 threshold specified in the instructions for the schedule.[126] AT&T comments on what it believes to be the proprietary nature of advertising expenses, disclosure of which would allow competitors to calculate what percentage of revenues it spends on advertising.[127]

116. With respect to membership fees and dues, commenting parties believe the proposed schedule for reporting these expenses should be deleted from the Form M.[128] With respect to the same proposed schedule, SNET believes membership fees and dues should be held confidential because it is not necessary to the Commission in the exercise of its regulatory oversight.[129] Commenting parties also offer other suggestions of a minor editorial nature, which do not warrant separate discussion here.

3. Discussion

117. Upon consideration of the comments, we have decided to modify and rearrange the proposed schedules to avoid what we see as potential for duplicative reporting. We will not hold confidential as a matter of policy any of the schedules we adopt for the reasons stated in Section III of this Order.

118. We adopt Schedule I-6, *Advertising*, Schedule I-7, *Membership Fees and Dues*, and Schedule I-8, *Special Charges* as shown on Attachment B. We adopt separate schedules for advertising and membership fees and dues because these types of expenses are charged to both operating and nonoperating expense accounts and the data is necessary for our regulatory oversight. The information we seek is not available from other Form M schedules because the information is dispersed among accounts or

embedded in accounts with other related but not identical items. We do not expect this to create any additional burden since carriers are already required to submit the data that would be reported on the schedules we adopt.

119. In order to avoid duplicative reporting, we do not adopt the schedule for special charges as it was originally proposed. We will not require in Schedule I-8 the reporting of all individual items recorded in Account 7370, Special Charges, that amount to $100,000 or more. This schedule will exclude individual reporting of advertising expenses and membership fees and dues included in Account 7370. Advertising expenses and membership fees and dues will be reported on Schedule I-8 only in the aggregate.

V. *Donations and Other Services Rendered by Persons Other Than Employees*

1. Proposal

120. In the *OIC*, we proposed to retain this schedule in the Annual Report Form M. Schedule 43 is used to report payments to academia and payments for services rendered by persons other than employees. Carriers report donations and contributions, and aggregate payments to recipients when the payments exceed $25,000 during the calendar year covered by the report. Specific comments were requested on whether the dollar threshold for reporting of individual recipients on Schedule 43 should be raised for all or only some specific kinds of payments.[130]

2. Comments

121. The majority of the parties commenting recommend that the Commission eliminate this schedule entirely or raise the reporting threshold because the schedule is burdensome to prepare.[131] They believe that the benefits of this schedule to the Commission are clearly outweighed by the burden imposed in preparing it. If the Commission should find it necessary to retain this schedule, USTA and others recommend that the reporting threshold be raised from $25,000 to $250,000. Pacific Telesis states that raising the threshold would reduce the person hours required to complete this schedule by approximately 40 hours.[132] Bell Atlantic states that if the Commission raises the threshold to $250,000, that increase would still capture 95% of the total costs, while eliminating a large number of small transactions which are time consuming to track.[133] BellSouth states that in addition to raising the dollar threshold to $250,000, the Commission should add the exceptions that were formerly set forth under Part 31 to avoid the necessity of reporting routine recurring services.[134] NYNEX cites as an illustration New England Telephone's 1987 Form M Schedule 43. According to NYNEX, if a $250,000 threshold were applied, then 76% of the $62 million reported payments to outside vendors (excluding AT&T Technologies, NYNEX Material Enterprises and NYNEX Business Information Systems) would still have been reported, but the number of entries would have been reduced by 82%.[135] AT&T contends that setting the threshold at $250,000 would reduce its 1987 Schedule 43 from 23 to 5 pages, but would still enable the Commission to identify the organizations and individuals that received 95% of AT&T's payments and donations.[136] SWB states that if the $250,000 threshold had been used for its Schedule 43 in the 1987 Form M, 87% of the reported dollars would still have been captured, but 86% of the items would be eliminated, thereby saving substantial report preparation costs.[137] SNET also states that the reporting threshold for all expenses should be raised to $250,000 for the aggregate of all payments made to a recipient for services rendered during the year. SNET asserts that items below $250,000 account for only 1.8% of SNET's total operating expenses.[138] Other parties, while recommending that the dollar threshold be raised to $250,000, did not submit specific examples of the economics of such an increase.

122. Centel recommends that the reporting level be raised to $100,000. At this level, Centel contends 93% of the dollar value of currently reported payments would still be included, while eliminating nearly 60% of the number of individual entries on this report.[139] US West recommends that the Commission adopt a threshold of no less than $100,000 for entries in Schedule 43. US West believes that such an increase would be a more reasonable threshold and would also be in accord with the reporting limits on other Form M schedules. In addition, US West believes that regardless of the level of detail contained in Form M, detailed information on donations and payments will continue to be available to the Commission in its periodic audits.[140]

123. Ohio suggests that the Commission keep the $25,000 limit. Ohio contends that these types of expenses rarely exceed $100,000. If the ceiling is raised much above $25,000, the schedule would become useless.[141] USTA disagrees with Ohio contending that a $25,000 level is unrealistic given the nature and size of today's basic telephone business. Further, USTA states that almost by definition, such small transactions are not material or relevant to Form M objectives. At the $250,000 level, however, USTA states it is clear that most dollars will still be captured, but the redundancy of repetitive minor transactions can be avoided.[142]

3. Discussion

124. The comments of the carriers and our own independent analysis of Schedule 43 indicates that raising the reporting threshold to $250,000 would eliminate approximately 80 percent of the entries and still yield between 80 percent and 95 percent of the total dollars now reported. It is clear that for some items reported on this schedule a $250,000 threshold would strike an appropriate balance between the volume of the line items and the dollars reported. We therefore adopt the suggestion made by USTA and other commenting parties to raise the reporting threshold for some types of services to $250,000 during the calendar year. For all other services, the $25,000 limit will continue to apply. The services for which the limitation is raised are only advertising and information, clerical and office services, computer services, personnel services, printing and design services, and security services. We will also continue to require disclosure of all charitable donations and payments to academia because no party has challenged the relevance of the concerns originally expressed by the Commission in its Docket 19129, Phase II Final Decision and Order, which prompted the Commission to require data on payments to academia."[143] The schedule we finally adopt is included in Attachment B as Schedule I-9.

W. *Interest and Dividend Income and Extraordinary Items*

1. Proposal

125. In the *OIC*, we proposed two other schedules, one dealing with interest and dividend income (proposed Schedule 37) and the other dealing with disclosure of extraordinary items (proposed Schedule 45). Similar schedules were contained in the existing Form M.

2. Comments

126. *Interest and Dividend Income*. NYDPS believes the schedule should be expanded to require reporting of earnings and losses from affiliates.[144] USTA believes the schedule should be eliminated since affiliate and nonaffiliate data were included in proposed Schedule 17. Pacific Telesis also comments that a schedule structured so as to require the reporting of earnings/losses from affiliates accounted for on the equity method would require the carriers to provide information that is not necessary for the Commission to effectively monitor a company's rate of return, profitability, financial risk and growth.[145]

127. *Extraordinary Items*. USTA believes that this schedule is unnecessary since extraordinary items must be submitted to the Commission for review prior to journalization.[146] In addition, parties commenting on this schedule support a reporting threshold and recommend a threshold of $1 million. USTA states that such a threshold would avoid reporting of immaterial items.

3. Discussion

128. The information we seek on this schedule with respect to earnings and losses of affiliates is not identical to what would be reported on the Schedule B-3a we adopt in this Order. The earnings or losses reported on this schedule reflect earnings or losses for the year whether or not there has been a distribution of earnings. Schedule B-3a reflects only undistributed earnings or losses. With respect to Pacific Telesis's comments, we are interested in the information because it is a piece-part of what forms a larger picture of a carrier's dealings with its affiliates, all of which cannot be comfortably accommodated on a single schedule. In view of this, we adopt the reporting on interest and dividend income as shown on Schedule I-10.

129. With respect to the information on extraordinary items, we believe the information on the proposed schedule is necessary to form a complete picture of the results of operations. In published financial statements such information would ordinarily be the subject of footnote disclosure. In Form M reporting we have given such disclosure greater structure and eliminated the need for users to seek additional information from other documents located elsewhere in the Commission. We therefore adopt the Scheudle I-11 shown in Attachment B.

VI. STATISTICAL SCHEDULES

1. Proposal

130. For this group of schedules, seven in all, we proposed to delete data we felt was no longer necessary or relevant, and update the remaining data to reflect technological changes. More specifically, we proposed the elimination of existing Schedule 57B, *Marine Service to Mobile Stations*. For Schedule 50, *Outside Plant Statistics*, we proposed that the Part 32 plant account structure serve as the basic structure of the schedule. In addition, we included information on fiber optic plant and plant mileage currently included in other miscellaneous reports prepared by the carriers. For Schedule 51, *Statistics Relating to Central Offices*, and Schedule 52, *Access Lines in Service*, we made a distinction between digital and analog access and a distinction between access provided to different kinds of customers.

131. On Schedule 53, *Telephone Calls*, we proposed adding detail on billed minutes, which we believe is readily available to the carriers. We proposed to reformat Schedule 56, *Interstate Private Line Statistics*, to reflect current status of the network and on Schedule 57A, *Overseas Telephone and Related Services*, we proposed separate reporting for Canada and Mexico in order for the schedule to be comparable to other sources of data. We also propose to delete Section II of Schedule 57A dealing with direct service added or discontinued during the year.

2. Comments

132. USTA, commenting on proposed Schedules 50-57A, believes that the proposed statistical schedules contain definitional ambiguities which must be resolved. Data may not exist in the way it is being requested, and existing data may not be able to be used to derive the required data.[147] USTA further states that these schedules require a significant amount of clarification to provide greater precision, so that useful reporting will result.[148]

133. Ameritech also asserts that the required statistical information is not readily available and requires a considerable amount of time to prepare. Ameritech also believes that clarification and/or modification of instructions and data requirements is required so that useful, consistent reports will result.[149] US West also believes that the proposed schedules are not accompanied by instructions of sufficient detail to ensure that data submissions by the various companies are comparable. In addition, US West is concerned with the reporting burden associated with statistical schedules. An internal survey of their companies indicates that some of the data are not readily available from computerized systems and would have to be compiled manually. US West suggests the creation of a joint FCC/industry task force to determine the most economical means of satisfying the Commission's information needs and identifying the data categories with sufficient particularity to ensure that all respondents submit comparable data.[150] USTA further states that these schedules require a significant amount of clarification to provide greater precision, so that useful reporting will result.[151]

134. BellSouth believes that the Commission should delete the statistical schedules because they are not a part of the financial data required by Section 43.01 of the Commission's rules or by Section 211 or Section 219 of the Communications Act.[152] GTE asserts that the statistical schedules require numerous hours to compile. Further, GTE states the deletion of these schedules would save an estimated 1100 person hours of work for GTE alone.[153] With respect to the specifics, many commenting carriers also offer extensive and highly detailed editorial comments and suggestions.[154] Among those not previously mentioned are AT&T, Pacific Telesis, and SNET.

3. Discussion

135. The Commission has been receiving nonfinancial statistical data on Form M for many years. The data is extremely useful in evaluating the impact of new technology. These data are also useful to access the industry's response to changing developments such as bypass. In addition, information on the utilization of plant can be assessed from Form M that is useful in evaluating new and alternative service proposals.

136. Since the comments were filed on November 4, 1988, *exparte* meetings have been held with a USTA group of carrier representatives.[155] Changes have been made to clarify the technical definitions and ambiguities and provide more efficient formats for the collection of data. Virtually all of the carrier recommendations have been incorporated in the schedules we adopt as Schedules S-1 through S-6. Efforts have been made to minimize any duplication with ARMIS reportings. It is our ultimate intention to incorporate as much Form M data as possible into ARMIS. However, at this time ARMIS is not ready to accommodate the volume of statistics we require. Until that time a few items will be duplicated in both places. We do not anticipate that this will be a burdensome arrangement.

VII. PAPERWORK REDUCTION

137. On October 4, 1988, the revisions to the Form M that were proposed in the *OIC*, were forwarded to the Office of Management and Budget (OMB) for approval. A number of parties filed comments with OMB and that agency provided us with a set of those comments, which have been considered in the development of the revised Form M adopted by this Order.

138. On December 9, 1988, OMB approved the use of the proposed information collection through August 31, 1991, subject to certain conditions. These conditions included (1) an exploration of the treatment of proprietary data, where applicable, (2) submission of new additions or deletions of data to OMB for further review, (3) a revision of burden hour estimates based on commenting parties' reported experience in preparing the Form M, and (4) a continuation of the assessment of various reporting requirements with a view toward determining those which can be included in the ARMIS reporting system.

139. In this Order we have addressed the issues of confidential treatment (Section III) and we have made a substantial number of changes to our original proposal based, for the most part, on the suggestions of the commenting parties. The revised schedules adopted in this Order will be submitted to OMB for further review. Revised estimates of the reporting hour burden will accompany that submission. For the purposes of OMB review, we estimate that the average reporting hour burden will be approximately 1500 hours per respondent. We intend to perform an additional analysis of reporting hour burdens for the revised Form M in the coming months, and we will revise this 1500 hour estimate if the analysis, in light of the changes we make here, yields a different conclusion.

VIII. INITIAL FILING

140. In an order by the Deputy Chief, Operations, Common Carrier Bureau, released March 15, 1989, all carriers were granted an extension of time for filing with the Commission their Form M for the year ended December 31, 1988. The extension was granted because the Form M is normally due on March 31 of each year and carriers will need time to comply with the revised requirements. The date for filing was extended until 60 days from the release of this Order revising the Annual Report Form M.[156] The filing is to be made on standard 8 1/2 by 11 inch paper, with a minimum 5/8 inch margin at the top for binding purposes. Reports should be bound in such a manner as to permit easy substitution of superseded schedules. In the interest of time, it is suggested that, for the initial filing of the revised Form M, the forms attached to this release be enlarged to facilitate completion and then reduced to the required size for submission. Also, upon request and submission of three formatted 5 1/4 inch disks, we will make the forms available on computer disks to state regulatory commissions. Use of the disks may require special software obtainable from non-governmental sources.

IX. ORDERING CLAUSE

141. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201-205, 215, 219, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. 154 (i), 154 (j) 201-205, 215, 219, and 220, that the revised Form M schedules contained in Appendix B attached ARE ADOPTED, effective 30 days from publication of the schedules in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

NOTE :

The Attachments to the Order are available for inspection in Room 812, 2000 L St. Washington, D.C.

FOOTNOTES

[1] 47 C.F.R. §43.21.

[2] *See* 47 C.F.R. §1.785(3).

[3] Revision of Annual Report Form M, *Order Inviting Comments*, DA 88-1218 released September 9, 1988.

[4] Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67 and 69 of the FCC's Rules) CC Docket No. 86-182, 2 FCC Rcd 5770 (1987) (*ARMIS Order), modified on recon.*, 3 FCC Rcd 6375 (1988) FCC 88-311 (released October 14, 1988) *ARMIS Reconsideration Order.*

[5] *Id. ARMIS Order* at 5774-5.

[6] *Id. ARMIS Order* at 5775. Authority to propose changes to the Part 43 reports, including the Form M, was delegated to the Common Carrier Bureau.

[7] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Part 31, 43, 67 and 69 of the FCC's Rules) DA 88-2066, released January 6, 1989 (*ARMIS USOA Order*).

[8] Schedule 12B, *Analysis of Credits for Telephone Plant Retired;* Schedule 12C, *Analysis of Entries in Property Held for Future Telephone Use; Schedule 13A, Analysis of Telephone Plant Acquired;* Schedule 13B, *Analysis of Telephone Plant Acquisition Adjustments;* Schedule 13C, *Analysis of Telecommunications Plant Purchased From or Sold to Affiliates;* Schedule 14C, *Bases of Charges for Depreciation; Schedule 15, Analysis of Entries in Amortization Reserve;* Schedule 22, *Deferred Charges;* Schedule 30A, *Other Deferred Credits;* Schedule 50, *Outside Plant Statistics;* and Schedule 56, *Interstate Private Line Statistics.*

[9] Schedule 53, *Telephone Calls;* Schedule 57, *Overseas Telephone and Related Services;* Schedule 36A, *Other Operating Taxes;* Schedule 36B, *Prepaid Taxes and Tax Accruals;* Schedule 36D, *Excise Taxes Collected from Users;* and Schedule 40, *Advertising.*

[10] Pacific Telesis comments at 9. Under the ARMIS method, carriers submit two report versions, a *public version* and a *confidential version.* The *public version* simply does not contain the data for which the carrier is seeking proprietary treatment. The Commission's FOIA procedures referred to by Pacific Telesis are set out in 47 C.F.R. §0.461.

[11] *Id.* at 8.

[12] BellSouth reply comments at 2-3 and Pacific Telesis reply comments at 12.

[13] SNET comments at 4. The information SNET believes is proprietary has been included in Form M reports for many years. SNET does not elaborate on what has occurred that would now warrant proprietary treatment nor does it make any allegation of competitive harm. As a result, in Section V-U of this Order we adopt the reporting of membership fees and dues substantially as proposed because these expenses are of interest for ratemaking purposes. *See* Amendment of Part 65 to Prescribe Components of the Rate Base and Net Income of Dominent Carriers, *Report and Order* 3 FCC Rcd 269 (1987).

[14] For example, Centel comments at 3; USTA comments Attachment 1, at 1.

[15] *Id.* USTA.

[16] USTA comments Attachment 2, at 1.

[17] Schedule 12A, *Analysis of Telephone Plant Accounts; Schedule 31, Retained Earnings Reserved; Schedule 32, Dividends Declared; Schedule 33, Analysis of Entries in Other Capital and Retained Earnings Accounts;* Schedule 34, *Other Revenues;* and Schedule 35, *Operating Expenses.*

[18] SNET comments at 3; SWB comments at 2; GTE comments at 4; Ameritech comments Attachment A; Bell Atlantic comments at 3; USTA comments Attachment 1, at 5; SWB reply comments at 2.

[19] Ameritech comments Attachment A; USTA comments at 5; SNET comments at 3.

[20] Similar comments were made with respect to proposed Schedule 11, *Income Statement Accounts; See* V-C of this Order.

[21] Ohio comments at 3.

[22] *Id.* at 3. Ohio would add these columns on pages 1, 4, and 5 of Schedule 10.

[23] NYDPS comments at 9.

[24] *Id.*

[25] USTA reply comments at 6.

[26] BellSouth reply comments at 4-5; and NYNEX reply comments at 5.

[27] *See* note 7, *supra.*

[28] COMSAT also files a Form M Annually. In its comments COMSAT seeks clarification as to whether the proposed revised Schedules 10 and 11 are applicable to COMSAT. Since COMSAT is not required to adopt the Commission's Uniform System of Accounts, we will permit it to continue filing in the FORM M format they currently use.

[29] Ohio comments at 3.

[30] Ameritech reply comments at 7.

[31] Pacific Telesis reply comments at 4.

[32] Arthur Andersen comments at 1-2.

[33] SFAS-95 became effective for financial statements published for fiscal years ending after July 15, 1988.

[34] USTA reply comments at 8-9.

[35] BellSouth comments at 6; Contel reply comments at 2; and Pacific Telesis comments at 6-7.

[36] Arthur Andersen comments at 1; SWB comments at 2; SNET comments at 3; BellSouth comments at 6; USTA comments at 8; Centel comments at 3; and Pacific Telesis comments at 6.

[37] Arthur Andersen comments at 2.

[38] USTA comments Attachment 1, at 4.

[39] Ohio comments at 4.

[40] NYDPS comments at 5.

[41] Under the "cost method", the investor records the investment at cost. The net accumulated earnings of an investee subsequent to the date of the investment are recognized by the investor only to the extent distributed by the investee as dividends. Under the "equity method", the investor records the investment at cost, but adjusts the carrying amount to reflect its share of the earnings or losses of the investee after the date of acquisition. Generally accepted accounting principles (GAAP) require the use of the "equity method" when the investor has the ability to exercise significant influence over the operating or financial policies of the investee.

[42] NYDPS comments at 13-14.

[43] USTA reply comments at 9.

[44] Pacific Telesis reply comments at 12.

[45] *Id.* at 12. BellSouth reply comments at 2-3. The matter of confidential treatment is dealt with in Section III of this Order.

[46] US West reply comments at 3.

[47] Ameritech reply comments at 7.

[48] NYNEX reply comments at 4. Also see Bell Atlantic reply comments at 1. NYNEX specifically mentions Cost Allocation Manuals required to be filed with the Commission that detail the nature, frequency and terms of affiliated transactions and the requirements for the performance of attestation audits.

[49] BellSouth reply comments at 2.

[50] *Id.* at 2-3.

[51] USTA comments at 7-8.

[52] *Id.* at 7-8; BellSouth comments at 7; SWB comments Appendix 1, at 4.

[53] BellSouth reply comments at 3; SWB comments Appendix 1, at 4.

[54] USTA comments at 8. This calculation is based on the gross operating revenue threshold for filing the Form M.

[55] BellSouth comments at 6.

[56] Centel comments at 6.

[57] AT&T reply comments at 2.

[58] We will also correct the instructions to reflect no further segregation of nonaffiliated companies on this schedule.

[59] Separation of costs of regulated telephone service from costs of nonregulated activities. *Report and Order*, 2 FCC Rcd 1298 (1987), *recon.*, 2 FCC Rcd 6283 (1987), modified *on further recon.*, 3 FCC Rcd 6701 (1989).

[60] NYDPS comments at 7.

[61] Ohio comments at 6.

[62] Centel comment at 4.

[63] Ameritech reply comments at 6; BellSouth reply comments at 3.

[64] BellSouth reply comments at 3.

[65] USTA reply comments at 7.

[66] AT&T reply comments at 5.

[67] In the schedule we adopt, we do not require a footnote explaining the source of "fair market value" as suggested by NYDPS and Ohio, and Centel would not be required to report each purchase transaction, but rather a total of all transactions by affected account.

[68] NYDPS comments at 13-14.

[69] USTA comments Attachment 1, at 2.

[70] For example, if a carrier operated in two states, it would file one schedule for each state and one for company-wide operations -- a total of 3 schedules.

[71] SWB comments Appendix 1, at 2; NYNEX comments at 2-3; GTE comments at 7; US West comments at 2-3; USTA comments Attachment 1, at 3; and BellSouth comments at 3.

[72] SWB reply comments at 6.

[73] AT&T comments at 5 and AT&T reply comments at 6.

[74] Ohio comments at 8.

[75] Ameritech reply comments at 8. Ameritech also makes several suggestions to clarify reporting instructions in its comments, Attachment A, at 2.

[76] USTA comments Attachment 2, Schedule 14A.

[77] SWB comments Appendix 1, at 2; BellSouth comments at 3; USTA comments Attachement 1, at 4; and NYNEX reply comments at 7; More precisely, NYNEX mentions that New York Telephone provides service in a very small portion of Connecticut that is combined with New York data for ratemaking purposes and feels it would be burdensome to report separately on very limited Connecticut operations (NYNEX comments at 2-3), but that it would not object to reporting by state. (NYNEX reply comments at 7).

[78] US West comments at 3.

[79] AT&T comments at 5.

[80] Bell Atlantic comments at 4; USTA reply comments at 8.

[81] *See* Prescription of Revised Percentages of Depreciation for American Telephone and Telegraph Company's 22 interexchange companies pursuant to the Communications Act of 1934, as amended, *Order* FCC 89-29, adopted January 30, 1989.

[82] With respect to Schedule 14A, Ohio's comments on state-by-state reporting of "jurisdictional" and "nonjurisdictional" data and Ameritech's expression of support for combined interstate and intrastate reporting on a state-by-state basis are no longer relevant because of our decision to require company-wide data only.

[83] 47 C.F.R. §65.820(a) allows property recorded in this account to be included in a carrier's rate base.

[84] USTA comments Attachment 1, at 2.

[85] *Id.*

[86] USTA comments Attachment 1, at 3.

[87] USTA comments at 7. In reply comments, USTA concedes reporting by plant category should be sufficient. USTA reply comments at 7.

[88] BellSouth comments at 5-6.

[89] Centel comments at 4.

[90] NYDPS comments at 6-7.

[91] Ohio comments at 6.

[92] USTA reply comments at 7.

[93] NYNEX reply comments at 3.

[94] *See* Revision of the Uniform System of Accounts for telephone companies to accommodate generally accepted accounting principles (Part 31, 33, 42, and 43 of the FCC's Rules) 50 Fed.Reg. 48408, November 25, 1985.

[95] Comparison of 1988 Tariff Review Plan COS 1p 32 line 650 with 1989 Tariff Review Plan COS 1p line 440.

[96] 47 C.F.R. §36.161 (b).

[97] SNET comments at 4. USTA comments Attachment 1, at 4.

[98] NYDPS comments at 15-16.

[99] AT&T reply comments at 5.

[100] Centel comments at 6.

[101] No party opposed our proposal and therefore, it is adopted as Schedule B-10.

[102] Only one party filed comments and it agreed on the elimination of existing Schedule 25. Thus, we eliminate this schedule from the Form M we adopt.

[103] NYDPS comments at 14.

[104] USTA comments Attachment 2, at 4.

[105] NYDPS comments at 15.

[106] USTA reply comments at 9-10.

[107] The schedule numbering scheme we adopt for the revised Form M follows the order of presentation of accounts in Part 32 as much as possible. Thus, the schedule dealing exclusively with long-term debt (B-10) will precede those relating to capital stock (B-14 and B-15). In between, there will be several schedules dealing with tax liabilities and other deferred credits.

[108] USTA comments Attachment 1, at 4.

[109] NYDPS comments at 3.

[110] For example, AT&T reports on its Form M for the year ended December 31, 1987 that the combined balance in its deferred tax accounts 176.1 and 176.2 had a net change during the year of approximately $15 million.

[111] USTA comments Attachment 1.

[112] Amendment of Annual Report Form M and FCC Report 901, CC Docket No. 85-308, 51 Fed. Reg. 12157, April 9, 1986.

[113] NYDPS comments at 7.

[114] BellSouth comments at 7; GTE comments at 7; SNET comments at 4; Ameritech comments Attachment A, at 3; Bell Atlantic comments at 4; Pacific Telesis comments at 2. We specifically address Bell Atlantic's comment that in the Order adopting Part 32, the Commission declined to require specific identification of affiliate transactions in each expense account in the accounting system we adopted. The Bell Atlantic cite of the Order adopting Part 32 predates Commission decisions in Docket 86-111, which elevated the importance of affiliate transactions. Moreover, the implication that the Commission concluded the data in question was unimportant fails to recognize that Part 32 does require segregations for the balance sheet items that customarily form part of the expense entry--payables to affiliates.

[115] USTA reply comments at 13.

[116] Ameritech comments Attachment A, at 1, Pacific Telesis comments at 5, SWB comments Appendix 1, at 6.

[117] USTA comments Attachment 1, at 8; Pacific Telesis comments at 4-5; and SNET comments at 3.

[118] Ohio comments at 5.

[119] USTA comments Attachment 1, at 8.

[120] This responds to the inquiries of several carriers who questioned what to report for the preceeding year (1987) in reports for the calendar year ended December 31, 1988.

[121] USTA comments at 1.

[122] USTA comments at 1.

[123] AT&T comments at 8-9 (also see Section III of this Order).

[124] USTA comments Attachment 1.

[125] *Id.*

[126] *Id.*; AT&T comments at 2-3; Contel comments at 6.

[127] AT&T comments at 8-9.

[128] Bell Atlantic comments at 5; BellSouth comments at 7-8; Ameritech comments Attachment A, at 2; AT&T comments at 3-4; GTE comments at 5, 7 and 8; SWB comments Appendix 1, at 1; and USTA comments at 9 and 11.

[129] SNET comments at 4.

[130] Respondents are required to report by type of service in alphabetical order. The types of service reported include: advertising and information, auditing and accounting, clerical and office services, computer services, consulting and research, financial services, legal services, personnel services, printing services, security services, and trustee services.

[131] Pacific Telesis comments at 3; Bell Atlantic comments at 6; BellSouth comments at 4; Ameritech comments Attachment A, at 2; AT&T comments at 3 and 4; SNET comments at 5 and 6; GTE comments at 5, 7 and 8; SWB comments Attachment 1, at 1 and 5; and USTA comments Attachment 1.

[132] Pacific Telesis comments at 3.

[133] Bell Atlantic comments at 6.

[134] BellSouth comments at 4.

[135] NYNEX comments at 3.

[136] AT&T comments at 3.

[137] SWB comments at 1 and 5.

[138] SNET comments at 5-6.

[139] Centel comments at 6.

[140] US West comments at 4-5.

[141] Ohio comments at 9.

[142] USTA reply comments at 11-12.

[143] American Telephone and Telegraph Co., Phase II Final Decision and Order 64 FCC 2d 1 (1977), *recon.* 67 FCC 2d (1978). The Commission concluded that it could not identify or review the reasonableness of those expenditures and concluded the carriers should report amounts paid for academia expenses (pages 87-88).

[144] NYDPS comments at 16-17.

[145] Pacific Telesis reply comments at 12.

[146] USTA comments Attachment 1.

[147] USTA comments at 4.

[148] *Id.* at page 11.

[149] Ameritech comments Attachment A, para. 6.

[150] US West comments at 6.

[151] *Id.* at 11.

[152] BellSouth comments at 9.

[153] GTE comments at 6.

[154] USTA reply comments at 12-13.

[155] Summaries of these meetings have been included in the record for this proceeding.

[156] Revision of Annual Report Form M, *Order*, DA 89-275.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-120

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Cuba, Northwye and Waynesville, Missouri) — RM-6701

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: May 15, 1989; Released: June 16, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by CTC Communications, Inc. (petitioner), requesting the allotment of FM Channel 271A to Northwye, Missouri, as that community's first FM broadcast service. Petitioner submitted information in support of the proposal and stated its intention to file an application for Channel 271A at Northwye.

2. Channel 271A can be allotted to Northwye, Missouri, at the city reference coordinates, in compliance with the Commission's spacing requirements.[1] The allotment at Northwye will require substitutions at Cuba and Waynesville, Missouri. A staff engineering study confirms that Channel 297A can be substituted for Channel 271A at Cuba, Missouri, at the site specified by the applicant for Channel 271A.[2] Lake Broadcasting, Inc. is the applicant for the channel at Cuba (881230MC). The applicant for Channel 271A at Cuba would be permitted to specify the new Class A channel and retain its cut-off protection, since the channels are equivalent. Petitioner has also proposed the substitution of Channel 274A for Channel 272A at Waynesville, Missouri. Channel 274A can be allotted to Waynesville at the current site of Station KJPW-FM.[3] Thus, we shall issue an Order to Show Cause to Pulaski County Broadcasting, Inc., the licensee of Station KJPW-FM.

3. Whenever an existing licensee is ordered to switch frequencies in order to accommodate a new channel allotment, we require that the proponent of the new allotment make a commitment that it will reimburse the affected station for the costs incurred in changing frequencies. Petitioner has indicated its willingness to reimburse the licensee of Station KJPW-FM for its costs in implementing the change in frequency in accordance with Commission policy should it be awarded a construction permit for Channel 271A at Northwye. Petitioner has also stated its willingness to reimburse the applicant for the channel at Cuba for the reasonable cost of amending its application if still pending or modifying its permit if already granted.

4. In view of the fact that the proposed allotment could provide a first local FM broadcast service at Northwye, Missouri, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules as follows:

City	Channel No. Present	Proposed
Cuba, Missouri	271A	297A
Northwye, Missouri	---	271A
Waynesville, Missouri	272A	274A

5. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Pulaski County Broadcasting, Inc., licensee of Station KJPW-FM, Waynesville, Missouri, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 274A in lieu of Channel 272A.

6. Pursuant to Section 1.87 of the Commission's Rules, Pulaski County Broadcasting, Inc. may, not later than **August 7, 1989,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Pulaski County Broadcasting, Inc., to furnish additional information. If Pulaski County Broadcasting, Inc., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Pulaski County Broadcasting, Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Clay S. Howlett,
President
Pulaski County
Broadcasting, Inc.
Radio Station KJPW-FM
P.O. Box D
Waynesville, Missouri 65583

Kenneth W. Kuenzie,
Vice President
Lake Broadcasting,
Inc.
Route 3, Box 4881
Lake Road 54-24
Osage Beach, Missouri 65065

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **August 7, 1989,** and reply comments on or before **August 22, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Martin R. Leader
Ann K. Ford
John J. McVeigh
Fisher, Wayland, Cooper
and Leader
1255 - 23rd Street, N.W.
Suite 800
Washington, D.C. 20037-1125

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 271A at Northwye are 37-58-30 and 91-45-48.

[2] The coordinates for Channel 297A at Cuba are 38-03-49 and 91-24-37.

[3] The coordinates for Channel 274A at Waynesville are 37-49-09 and 92-09-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-130

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Medical Lake, Washington and Sandpoint, Idaho) RM-6668

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: May 23, 1989; Released: June 16, 1989

By the Chief, Allocations Branch:

1. At the request of Larry and Sheryl Roberts, d/b/a Roberts Broadcasting (petitioner), permittee of Station KAAR(FM), Channel 237A, Medical Lake, Washington, the Commission has before it for consideration a proposal to substitute Channel 237C2 for Channel 237A at Medical Lake and modify the construction permit of Station KAAR(FM) to specify the higher powered channel. Petitioner also seeks the modification of the license for Station KPND(FM), Channel 237A, Sandpoint, Idaho, to specify operation on Channel 278A in lieu of Channel 237A in order to accommodate the upgrade at Medical Lake.

2. Channel 237C2 can be allotted to Medical Lake in compliance with the Commission's minimum distance separation requirements with a site restriction, provided the channel substitution (Channel 278A for Channel 237A) is made at Sandpoint. Therefore, we are issuing a *Show Cause Order* to Blue Sky Broadcasting Incorp., the licensee of Station KPND(FM) at Sandpoint, seeking comments as to why its license should not be modified to specify operation on Channel 278A in lieu of Channel 237A. Petitioner specified its desire to relocate its current transmitter site 14.8 kilometers (9.2 miles) northwest of Medical Lake to accomplish the upgrade.[1]

3. Since the communities are located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government must be obtained for the proposal.

4. Commission policy requires that the petitioner reimburse Station KPND(FM) for the reasonable costs of changing its frequency. Petitioner states its willingness to reimburse Station KPND(FM).

5. As requested, we shall propose to modify the permit of Station KAAR(FM), Channel 237A at Medical Lake to specify operation on Channel 237C2. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Medical Lake.

6. In view of the fact that Medical Lake, could receive its first wide coverage area FM service the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Sandpoint, Idaho	237A, 273A	273A, 278A
Medical Lake, Washington	237A	237C2

7. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Blue Sky Broadcasting Incorp., licensee of Station KPND(FM), Channel 237A, Sandpoint, Idaho, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 278A in lieu of Channel 237A.

8. Pursuant to Section 1.87 of the Commission's Rules, Blue Sky Broadcasting Incorp., not later than **August 7, 1989** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Blue Sky Broadcasting Incorp., to furnish additional information. If Blue Sky Broadcasting Incorp., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Blue Sky Broadcasting Incorp., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Blue Sky Broadcasting Incorp.
327 Marion Street
Sandpoint, ID 83864

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **August 7, 1989,** and reply comments on or before **August 22, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Clifford M. Harrington, Esquire
Fisher, Wayland, Cooper
and Leader
1255 23rd Street, N.W.
Suite 800
Washington, D. C. 20037
(Counsel for petitioner)

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The proposed restricted site coordinates are 47-41-30 and 117-46-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-133
through 89-281, inclusive

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.

NOTICE OF PROPOSED RULE MAKING

Adopted: May 31, 1989; **Released: June 16, 1989**

By the Chief, Allocations Branch:

1. The Commission, on its own motion, hereby proposes to amend the FM Table of Allotments by reclassifying to Class C3 the Class A allotments listed in Appendix B to this document, and modifying the licenses of the corresponding stations accordingly. We believe that the public interest would be served by taking these actions on our own motion rather than awaiting the receipt of individual rule making requests from these stations, because proceeding in this fashion will speed the initiation of improved service to the public and conserve Commission resources.

2. This action is made possible by the Commission's *First Report and Order* in MM Docket 88-375, 4 FCC Rcd 2792 (1989), which created an additional class of FM broadcast stations, Class C3. In preparation for that action, the Commission identified a number of Class A stations which may be upgraded to Class C3 without requiring a change in transmitter site or operating frequency, and without precluding any other Class A stations from upgrading to Class C3 on their present channel and at their present sites. The tentative list was appended to the Public Notice, "Mass Media Bureau to Propose Upgrades on its Own Motion," March 31, 1989, Mimeo No. 2232. Appendix B to this *Notice* is a final listing, by channel number, of the stations which we propose to upgrade, their call signs, the licensee's or permittee's name and address, the coordinates for the proposed Class C3 channel, and the docket number assigned to each individual proposal. Upon further examination of the tentative list, we have removed several stations from the list, either at their own request, because they separately petitioned for rule making to upgrade their stations to a class other than C3, or because they were improperly included in the list.

3. With the exception of relieving the requirement that the listed licensees and permittees submit individual petitions for rule making requesting the proposed upgrade, these proposals will be administered like routine FM allotment rule making proceedings. Each proposal has been assigned a separate docket number. *A party filing a comment or counterproposal should direct its pleading to the specific allotment proposal it is interested in commenting on or submitting a counterproposal to by referencing the specific docket number assigned to that proposal, and only that docket number, in the caption of its pleading.*[1] *Failure to identify the specific docket number of the proposal which the pleading addresses may result in that pleading not being considered, a delay in the final resolution of the proceeding, or dismissal of the proposal.* In addition, pleadings filed in response to this *Notice* must comply with the requirements contained in the Commission's rules.

4. Each of the affected licensees and permittees will be mailed a copy of this *Notice*, but we have not attempted to determine whether these parties are represented by legal counsel, and, if so, to mail counsel a copy of this *Notice*. Licensees or permittees wishing to be represented by legal counsel are responsible for separately contacting counsel.

5. Each licensee must file comments by the comment deadline set forth in paragraph 10 below, affirmatively stating an intention to apply for and construct a Class C3 facility, if allotted. Where the licensee does not affirmatively state such an intention the proposal will be dismissed for lack of interest, consistent with normal practice. Therefore, licensees and permittees who *do not* wish to pursue an upgrade in class should simply do nothing in response to this *Notice*.

6. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at the station's community of license and we will not require the licensee to demonstrate the availability of an additional equivalent class channel for use by other interested parties. However, counterproposals may be filed requesting the allotment of a mutually exclusive channel to another location. These counterproposals must be served on the licensee. In those cases where a licensee may be represented by legal counsel, it is the licensee's responsibility to alert its counsel to the existence of the counterproposal since we have not identified those licensees which are so represented. The current procedure of providing separate public notice of all acceptable counterproposals and affording an opportunity to respond thereto after the normal comment and reply comment pleading cycle will, of course, be followed in these proceedings.

7. Appendix B includes several proposals to upgrade stations that currently operate on Channel 221, and whose upgraded 1 mV/m contour would lie within the Grade B contour of a TV Channel 6 station.[2] These stations, should they choose to pursue an upgrade, must include a noncommercial educational impact study with their comments. *See Myrtle Beach, South Carolina*, MM Docket 88-572, 3 FCC Rcd 7269 (1988), for the parameters of the required showing. In addition, any party filing a counterproposal in this proceeding which, if adopted, would result in the upgrading of a station on Channel 221, and would extend that station's 1 mV/m contour inside the Grade B contour of a TV Channel 6 station, should also file such a study.

8. Coordination with either the Canadian or Mexican government is required for those stations listed in Appendix B which are located within 320 kilometers of either border. Therefore, proposals requiring coordination will not be finalized until concurrence by the respective government has been received.

9. We believe the public interest would be served by proposing the channel allotments listed in Appendix B since it could allow the respective stations to improve

their coverage areas. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed in Appendix B.

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix A and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of Appendix A before a channel will be allotted.

11. Interested parties may file comments on or before **August 7, 1989,** and reply comments on or before **August 22, 1989,** and are advised to read Appendix A for the proper procedures. Additionally, a copy of such comments should be served on the licensee or permittee, as identified in Appendix B.

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

13. For further information concerning the individual proceedings, contact the Allocations Branch, Mass Media Bureau, at (202) 634-6530, as follows: (1) Nancy Joyner for those stations in Alabama, Alaska, Arizona, Arkansas, California, Colorado, and Indiana; (2) Nancy Walls for those stations in Connecticut, Delaware, the District of Columbia, Florida, Georgia, Guam, Hawaii, Idaho, Illinois and Kentucky; (3) Kathleen Scheuerle for those stations in Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, and Montana; (4) Leslie Shapiro for those stations in Iowa, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Samoa, South Carolina and South Dakota; and (5) Patricia Rawlings for those stations in Louisiana, Tennessee, Texas, Utah, Vermont, Virginia, Virgin Islands, Washington, West Virginia, Wisconsin and Wyoming. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX A

MM Docket Nos 89-133
through 89-281, inclusive

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off protection.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person

filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

APPENDIX B

Channel & Status	Call Sign	Location, Coordinates, Licensee, and Address
1. MM Docket No. 89-133		
221 LIC	KSBS FM	PAGO PAGO AS 14-17-41 170-39-44 Samoa Technologies P. O. Box 793 Pago Pago AS 96799
2. MM Docket No. 89-134		
221 CP	KRBZ	TUSAYAN AZ 35-57-45 112-04-45 Tusayan Broadcasting Company, Inc. P.O. Box 3085 Grand Canyon AZ 86023
3. MM Docket No. 89-135		
221 LIC	KBLJ	LA JUNTA CO 37-59-15 103-34- 2 La Junta Broadcasters, Inc. P.O. Box 485 La Junta CO 81050
4. MM Docket No. 89-136		
221 LIC	WMMK	DESTIN FL 30-23-8 86-24-52 Gulfcoast Broadcasting, Inc. P.O. Box 817 Destin FL 32541
5. MM Docket No. 89-137		
221 LIC	KOWO FM	WASECA MN 44-02-45 93-23-08 Waseca Communications, Inc. 22 North State, P.O. Box 505 Waseca MN 56093
6. MM Docket No. 89-138		
221 LIC	KRRB	DICKINSON ND 46-55-24 102-43-35 Roughrider Broadcasting Co. 129 Third Ave., East Dickinson ND 58601
7. MM Docket No. 89-139		
221 LIC	KATK FM	CARLSBAD NM 32-27-2 104-12-47 Radio Carlsbad, Inc. P.O. Box 70 Carlsbad NM 88220
8. MM Docket No. 89-140		
221 LIC	KWJY	WOODWARD OK 36-24-2 99-25-44 Dwaine T. Martin P.O. Box 1600 Woodward OK 73802
9. MM Docket No. 89-141		
221 LIC	KWVR FM	ENTERPRISE OR 45-19-1 117-13-14 Wallowa Valley Radio Broadcasting Corp. 107 SW 1st Street Enterprise OR 97828
10. MM Docket No. 89-142		
224 LIC	KORT FM	GRANGEVILLE ID 45-53-5 116-06-30 4-K Radio, Inc. P.O. Box 936 Lewiston ID 83501
11. MM Docket No. 89-143		
224 LIC	KYZZ	WOLF POINT MT 48-11-9 105-40- 8 Wolf Point Broadcasting Co., Inc. 324 Main Street Wolf Point MT 59201
12. MM Docket No. 89-144		
224 LIC	KBRB FM	AINSWORTH NE 42-33-16 99-49-52 KBRB Broadcasting Co. 122 East 2nd Street Ainsworth NE 69210
13. MM Docket No. 89-145		
224 LIC	KLBN	ALBION NE 41-40-45 98-00-43 Emanuel W. Skala Box 122 Albion NE 68620
14. MM Docket No. 89-146		
224 LIC	KMXQ	SOCORRO NM 34-02-43 106-54-21 H & HSB Corporation 2285 Schoernersville Rd Bethlehem PA 18017

15. MM Docket No. 89-147
224 LIC KQAY FM TUCUMCARI NM
35-10-15 103-42-25

Sagebrush Communications, Inc.
P.O. Box 668
Tucumcari NM 88401

16. MM Docket No. 89-148
224 LIC KBXS ELY NV
39-14-46 114-55-39

KBXS Broadcasting, Inc.
484 Aultman St.
Ely NV 89301

17. MM Docket No. 89-149
224 LIC KPAH TONOPAH NV
38-04-22 117-13-16

Roughrider Broadcasting, Inc.
3950 S. Eastern #180
Las Vegas NV 89109

18. MM Docket No. 89-150
224 LIC KWNA FM WINNEMUCCA NV
41-00-40 117-45-59

Sheen Broadcasting Co.
P.O. Box 591
Winnemucca NV 89445

19. MM Docket No. 89-151
224 LIC KKBS GUYMON OK
36-42-43 101-45-59

Panhandle Communications, Inc.
3125 Norcrest
Oklahoma City OK 73121

20. MM Docket No. 89-152
224 CP KKRS BURNS OR
43-34-22 119-07-50

Christine E. Paul
20389 Barnard Ave
Walnut CA 91789

21. MM Docket No. 89-153
224 LIC KGFX FM PIERRE SD
44-22-15 100-24-17

Robert E. Ingstad, Jr.
214 W. Pleasant Dr.
Pierre SD 10225

22. MM Docket No. 89-154
224 LIC KIQZ RAWLINS WY
41-46-16 107-14-15

Elk Mountain Broadcasting
415 West Buffalo
Rawlins WY 82301

23. MM Docket No. 89-155
228 CP KDCZ DELTA JUNCTION AK
64-03-42 145-41-15

Delta Communications, Inc.
P.O. Box 507
Delta Junction AK 99737

24. MM Docket No. 89-156
228 LIC KXAZ PAGE AZ
36-46-42 111-25-46

Stephan G. Paranto, Temp. Custodian
91 N. 8th Avenue
Page AZ 86040

25. MM Docket No. 89-157
228 LIC KVWM FM SHOW LOW AZ
34-13-14 110-01-49

Dorothy Litchfield Woodworth
Box 970
Show Low AZ 85901

26. MM Docket No. 89-158
228 LIC KALQ FM ALAMOSA CO
37-28-20 105-51-13

Community Broadcasting Company
P.O. Box 179
Alamosa CO 81101

27. MM Docket No. 89-159
228 NEW 850712U7 PORT ST JOE FL
29-49-9 85-15-34

Maryann Wetmore-Kodish
H. Scott Wetmore
5121 Ehrlich Rd Suite 101A
Tampa FL 33624

28. MM Docket No. 89-160
228 LIC KPOA LAHAINA HI
20-50-43 156-54- 4

KPOA Radio, A Hawaii Ltd. Partnership
P.O. Box 10712
Lahaina, Maui HI 96761

29. MM Docket No. 89-161
228 LIC WZRK HANCOCK MI
47-06-5 88-35-26

Copper Country Enterprises, Inc.
326 Quincy St
Hancock MI 49930

30. MM Docket No. 89-162
228 LIC KLAN GLASGOW MT
48-05-42 106-37- 8

H-Z Corporation
504 Second Ave., South
Glasgow MT 59230

31. MM Docket No. 89-163
228 LIC KWMG COLUMBUS NE
41-27-14 97-24-20

Columbus Broadcasting Systems, Inc.
1418 25th Street
Columbus NE 68601

32. MM Docket No. 89-164

228 LIC KBUY FM RUIDOSO NM
33-23-12 105-40-14

Walton Stations-New Mexico, Inc.
P.O. Box 39
Ruidoso NM 88345

33. MM Docket No. 89-165

228 LIC KQIK FM LAKEVIEW OR
42-12-18 120-19-39

KQIK, Ltd.
HC 64 Box 46
Lakeview OR 97630

34. MM Docket No. 89-166

228 LIC KROO BRECKENRIDGE TX
32-45-31 98-56-0

Breckenridge Broadcasting Company
Route 3, Box 14
Breckenridge TX 76024

35. MM Docket No. 89-167

232 LIC KBUX QUARTZSITE AZ
33-40-58 114-13-59

Buck Burdette
P.O. Box 1
Quartzsite AZ 85346

36. MM Docket No. 89-168

232 LIC KCRE FM CRESCENT CITY CA
41-45-34 124-09-49

Ber-Tec Broadcasting, Inc.
P.O. Box 1066
Crescent City CA 95531

37. MM Docket No. 89-169

232 LIC KVIB MAKAWAO HI
20-50-48 156-19-35

Encantada Broadcasting Corporation
2000 Randolph Rd., S.E.
Albuquerque NM 87106

38. MM Docket No. 89-170

232 LIC KADQ FM REXBURG ID
43-48-56 111-45-28

Ted W. Austin, Jr.
Route 1, Box 215-6
St. Anthony ID 83445

39. MM Docket No. 89-171

232 LIC KYEE ALAMOGORDO NM
32-56-42 105-56-47

New West Broadcasting Company
1065 South Main Street
Las Cruces NM 88005

40. MM Docket No. 89-172

232 LIC KRTN FM RATON NM
36-53-8 104-26-33

Raton Broadcasting Company
1128 State St.
Raton NM 87740

41. MM Docket No. 89-173

232 LIC KYXX OZONA TX
30-42-39 101-07-34

The Foster Broadcasters, Inc.
City Hall Plaza West
San Angelo TX 76903

42. MM Docket No. 89-174

237 LIC KLRZ RED OAK IA
41-01-0 95-12-46

Montgomery County Broadcasting Co., Inc.
P.O. Box 465
Red Oak IA 51566

43. MM Docket No. 89-175

237 LIC KLER FM OROFINO ID
46-28-45 116-14-15

4-K Radio, Inc.
P.O. Box 936
Lewiston ID 83501

44. MM Docket No. 89-176

237 CP KECH FM SUN VALLEY ID
43-39-42 114-24-7

Ketchum Radio, Inc.
P.O. Box 2158
Ketchum ID 83340

45. MM Docket No. 89-177

237 LIC KKAN FM PHILLIPSBURG KS
39-47-32 99-19-55

Walter C. Seidel
P.O. Box 307
Phillipsburg KS 67661

46. MM Docket No. 89-178

237 LIC KQKI FM BAYOU VISTA LA
29-39-28 91-17-41

Teche Broadcasting Corporation
P.O. Box 847
Morgan City LA 70380

47. MM Docket No. 89-179

237 LIC KKBC FM BAKER OR
44-47-18 117-48-35

Grande Radio, Inc.
2510 East Cove Ave.
La Grande OR 97850

48. MM Docket No. 89-180

237 LIC KURY FM BROOKINGS OR
42-04-32 124-18-52

KURY Radio, Inc.
Radio Station KURY
Brookings OR 97415

49. MM Docket No. 89-181

237 LIC KLXS FM PIERRE SD
44-22-15 100-24-17

Sorenson Broadcasting
604 N. Kiwanis
Sioux Falls SD 57104

50. MM Docket No. 89-182

237 LIC KMRE DUMAS TX
35-51-51 101-55-45

Dumas Broadcasters, Inc.
408 N. Dumas Avenue
Dumas TX 79029

51. MM Docket No. 89-183

237 LIC KGHO FM HOQUIAM WA
46-55-53 123-44-2

Trinity Broadcasting Network
P.O. Box C-11949
Santa Ana CA 92711

52. MM Docket No. 89-184

240 CP KINQ FM FAIRBANKS AK
64-51-49 145-45-6

The Great Alaska Electric
Radio Co., Inc.
4600 Dale Rd.
Fairbanks, AK 99701

53. MM Docket No. 89-185

240 CP KKMX FM HAYDEN CO
40-31-15 107-17-46

Radio Colorado Northwest
P.O. Box QQ
Hayden CO 81639

54. MM Docket No. 89-186

240 LIC KBMG HAMILTON MT
46-13-46 114-14- 1

Benedict Communications
Limited Partnership
3805 Timberlane
Missoula MT 59802

55. MM Docket No. 89-187

240 LIC KLVM LEWISTOWN MT
47-04-13 109-24-26

Prunedale Educational Association
8145 Prunedale North Rd.
Prunedale CA 93907

56. MM Docket No. 89-188

240 CP KHWY SANTA ROSA NM
34-57-50 104-44-56

Don R. Davis
3611 Altamonte Ave., N.E.
Albuquerque NM 87110

57. MM Docket No. 89-189

240 LIC KXIT FM DALHART TX
36-05-45 102-30-38

Dalhart Broadcasters
P.O. Box 1350
Dalhart TX 79022

58. MM Docket No. 89-190

240 CP KDIU DIMMIT TX
34-35-11 102-18-35

Collins Communications Company
P.O. Box 608
Dimmit TX 79027

59. MM Docket No. 89-191

240 LIC KYXS FM MINERAL WELLS TX
32-48-42 98-06-11

Jerry Snyder and Associates, Inc.
Rt.1, Radio Road
Mineral Wells TX 76067

60. MM Docket No. 89-192

244 LIC KWCL FM OAK GROVE LA
32-51-33 91-21-26

Baker Broadcasting Co.
304 Cherry Lane
Mountain Home AR 12653

61. MM Docket No. 89-193

244 LIC KGVW FM BELGRADE MT
45-41-36 110-58-54

Christian Enterprises, Inc.
100 N 24th St. W. Ste. B
Billings MT 59102

62. MM Docket No. 89-194

244 CP KDRF DEER LODGE MT
46-24-26 112-43-8

Deer Lodge Broadcasting, Inc.
P.O. Box 811
Deer Lodge MT 59722

63. MM Docket No. 89-195

244 LIC KWDG IDABEL OK
33-52-54 94-49-10

Idabel Broadcasting Company
P.O. Box 418
Idabel OK 74745

64. MM Docket No. 89-196

244 LIC KXOX FM SWEETWATER TX
32-29-16 100-23-31

Stein Broadcasting Co., Inc.
1801 Hoyt Street
Sweetwater TX 79556

65. MM Docket No. 89-197

244 CP KOPI MOAB UT
38-35-7 109-33-44

Barkdale and Associates
3210 North Brookside Drive
Provo, UT 84604

66. MM Docket No. 89-198

249 LIC KSPN FM ASPEN CO
39-13-33 106-50-0

Broadcasting Company
of Palm Beach, Inc.
7301 South Dixie Highway
West Palm Beach FL
33480-2153

67. MM Docket No. 89-199

249 LIC KGLM FM ANACONDA MT
46-06-7 112-56-59

Howard M. Neckles
P.O. Box 772
Deer Lodge MT 59772

68. MM Docket No. 89-200

249 LIC KSWW RAYMOND WA
46-41-44 123-46-16

Pacific Broadcasting Co.
P.O. Box 628
Raymond WA 98577

69. MM Docket No. 89-201

250 CP KTBA TUBA CITY AZ
36-07-54 111-14-59

Western Indian Ministries, Inc.
P.O. Box F
Window Rock, AZ 86515

70. MM Docket No. 89-202

250 CP KPOD FM CRESCENT NORTH CA
41-45-35 124-11-28

Let's Talk Radio, Inc.
825 Mason Hall
P. O. Box 1915
Crescent City CA 95531

71. MM Docket No. 89-203

250 CP KUDO MILTON-FREEWATER OR
45-54-13 118-32-49

Nanette Markunas
P.O. Box 2576
Montauk NY 11954

72. MM Docket No. 89-204

251 CP WMLB GLEN ARBOR MI
44-49- 2 85-59-39

Michael E. Bradford
1873 Crouch Road
Jackson MI 49201

73. MM Docket No. 89-205

252 LIC KGUC FM GUNNISON CO
38-31-22 106-54-28

Gunnison Broadcasting Co.
113 East Georgia
Gunnison CO 81230

74. MM Docket No. 89-206

252 CP WCMZ FM SAULT STE. MARIE MI
46-29-10 84-13-49

Central Michigan University
3965 E. Broomfield Road
Mt. Pleasant MI 48859

75. MM Docket No. 89-207

252 LIC KDBM FM DILLON MT
45-14-22 112-40-3

Southwestern Broadcasting,
Inc.
212 E. Bannock
Dillon MT 59725

76. MM Docket No. 89-208

252 CP KIDD FM BEND OR
44-04-40 121-19-49

KITSAP Communications
Corp.
P.O. Box 9010
Portland OR 97207

77. MM Docket No. 89-209

252 LIC KFYZ FM BONHAM TX
33-33-26 96-13-13

Bonham Broadcasting Com-
pany
903 E. Sam Rayburn Dr.
Bonham TX 75418

78. MM Docket No. 89-210

252 LIC KKHQ ODEM TX
27-53-31 97-30-11

CAPI Spanish Broadcasting
Inc.
P.O. Box 637
Odem TX 78370

79. MM Docket No 89-211

252 LIC KPTX PECOS TX
31-26-9 103-30-14

PARDAY, Inc.
316 S. Cedar Street
Pecos TX 79772

80. MM Docket No. 89-212

252 LIC KRDF FM SPEARMAN TX
36-12-31 101-09-31

Spearhead Broadcasting, Inc.
4545 Mingo
Tulsa OK 74145

81. MM Docket No. 89-213

252 LIC KARB — PRICE UT
39-36-36 110-48-52

Eastern Utah Broadcasting Company
P.O. Box AC
Price UT 84501

82. MM Docket No. 89-214

252 LIC KERM — TORRINGTON WY
41-59-41 104-12-5

KATH Broadcasting, Inc.
P.O. Box 670
Torrington WY 82240

83. MM Docket No. 89-215

253 CP KCBZ — CLARKSVILLE TX
33-36-47 95-01-3

Radio Station KCAR, Inc.
228 West Main Street
Clarksville TX 75426

84. MM Docket No. 89-216

257 CP KVFC — SILVERTON CO
37-48-18 107-38-3

San Juan Christian Broadcasting
501 Riverside
Dolores CO 81323

85. MM Docket No. 89-217

257 LIC WIGM FM — MEDFORD WI
45-07-55 90-19-54

WIGM, Inc.
P.O. Box 59
Medford WI 54451

86. MM Docket No. 89-218

259 CP WWIS — BLACK RIVER FALLS WI
44-18- 4 90-54-22

WWIS Radio, Inc.
P.O. Box 277
Black River Falls, WI 54615

87. MM Docket No. 89-219

261 CP KYKD — BETHEL AK
60-48-20 161-47-14

Arctic Broadcasting Association
P.O. Box 773527
Eagle River AK 99577

88. MM Docket No. 89-220

261 LIC KWHQ FM — KENAI AK
60-30-49 151-11-19

KSRM, Inc.
H.C. 2 Box 852
Soldotna AK 99669

89. MM Docket No. 89-221

261 LIC KMXT — KODIAK AK
57-47-41 152-23-28

Kodiak Public Broadcasting Corp.
P. O. Box 484
Kodiak AK 99615

90. MM Docket No. 89-222

261 LIC KMMR — MALTA MT
48-15-17 107-49-18

Malta Broadcasting Corp.
P.O. Box 1073
Malta MT 59538

91. MM Docket No. 89-223

261 LIC KZOQ — MISSOULA MT
46-52-56 113-59-08

Spectrum Communications Corp.
2300 Regent Street
Missoula MT 59801

92. MM Docket No. 89-224

261 LIC KATQ FM — PLENTYWOOD MT
48-47-06 104-32-0

Radio International-KATQ, Inc.
112 Third Ave., East
Plentywood MT 59254

93. MM Docket No. 89-225

261 CP KDOT — KIMBALL NE
41-15-9 103-39-49

James E. George
6 White Surf Dr.
Columbus NE 68601

94. MM Docket No. 89-226

261 LIC KWRL — LA GRANDE OR
45-20-54 118-07-4

Grande Ronde Broadcasting, Inc.
105 Fir Street
La Grande OR 97850

95. MM Docket No. 89-227

262 LIC KICY FM — NOME AK
64-30-4 165-24-39

Arctic Broadcasting Assoc.
P.O. Box 820
Nome AK 99762

96. MM Docket No. 89-228

264 CP KRJT FM — BOWIE TX
33-38-43 97-49-8

Bowie-Nocona Broadcasting Co. Inc.
Box 1080
Bowie TX 76230

97. MM Docket No. 89-229

265 LIC	KAKN	NAKNEK AK 58-44-33 156-58-39 Bay Broadcasting Company, Inc. P.O. Box 111 Naknek AK 99633

98. MM Docket No. 89-230

265 LIC	KFSK	PETERSBURG AK 56-48-55 132-57-12 Narrows Broadcasting Corp. P.O. Box 149 Petersburg AK 99833

99. MM Docket No. 89-231

265 LIC	KJCO	YUMA CO 40-00-32 102-45-34 CEN-TEN Productions, Inc. Box 189 Yuma CO 80759

100. MM Docket No. 89-232

265 LIC	KXPO FM	GRAFTON ND 48-23-53 97-26-56 KGPC Company 45 W. 6th Grafton ND 58237

101. MM Docket No. 89-233

265 LIC	KOVC FM	VALLEY CITY ND 46-54-24 97-58-20 Ingstad Broadcasting, Inc. 232 - 3rd St., N.E. Valley City ND 58072

102. MM Docket No. 89-234

265 LIC	KFNC	SULPHUR OK 34-32-57 96-58-34 Murray County Broadcasting, Inc. 155 Broad Street Milford CT 06460

103. MM Docket No. 89-235

265 LIC	KIXC FM	QUANAH TX 34-18-58 99-44-49 Donald G. Navarro, Interim Trustee 4027 W. Lovers Lane Dallas TX 75209

104. MM Docket No. 89-236

266 CP	KSRL	SUTHERLIN OR 43-21-59 123-18-56 Sutherlin Radio Limited Partnership P.O. Box 574 Sutherlin OR 97479

105. MM Docket No. 89-237

269 LIC	KPEN FM	SOLDATNA AK 60-30-40 151-16-12 Peninsula Communications Incorp. Mi 1.8 Diamond Rd. Homer AK 99603

106. MM Docket No. 89-238

269 LIC	KSTK	WRANGELL AK 56-27-14 132-22-54 Wrangell Radio Group P.O. Box 282 Wrangell AK 99929

107. MM Docket No. 89-239

269 LIC	KTNY	LIBBY MT 48-22-14 115-32-19 Lincoln County Broadcasters, Inc. Cedar & S. Main, Box 730 Libby MT 59923

108. MM Docket No. 89-240

269 CP	KELY FM	ELY NV 39-15-52 114-53-35 Reed Communications, Inc. 807 Avenue F Ely NV 89301

109. MM Docket No. 89-241

269 LIC	KACA	PROSSER WA 46-12-5 119-45-42 Cormac C. Thompson, Inc. P.O. Box 591 Prosser WA 99350

110. MM Docket No. 89-242

270 CP	KAQU	HUNTINGTON TX Huntington Broadcasting Corporation Route 3, Box 515 Huntington, TX 75949

111. MM Docket No. 89-243

271 NEW	880505ML	BASILE LA 30-28-52 92-35-5 Nezpique Communications, Ltd. 430 S. Fifth Street Eunice LA 70535

112. MM Docket No. 89-244

272 LIC	KHNS	HAINES AK 59-13-6 135-25-29 Lynn Canal Broadcasting Box O, Twr Rd & Thrtr Rd. Haines AK 99827

113. MM Docket No. 89-245

272 CP	WAAH	HOUGHTON MI 47-06-13 88-34-4

WAAH Acquisition Partnership
5820 Hamilton Rd. #210
Columbus GA 31904

114. MM Docket No. 89-246

272 LIC WTKI FM GULFPORT MS
30-22-28 89-04-45

Holt Communications Corporation
1 Tower Park, Rt. 9, Box 34
Winchester VA 22601

115. MM Docket No. 89-247

272 CP KRNY KEARNEY NE
40-42-35 99-05-55

Polly A. Hays
Rt.2, P.O. Box 339D
Kearney NE 68847

116. MM Docket No. 89-248

272 LIC KWDQ WOODWARD OK
36-24-2 99-25-44

H. Grant Irwin, Jr.
2315 Downs Ave. Suite 200
Woodward OK 73801

117. MM Docket No. 89-249

276 LIC KRWA FM WALDRON AR
34-51-44 94-04-26

Good News Broadcasting Corporation
Highway 71
Waldron AR 72958

118. MM Docket No. 89-250

276 LIC KNDY FM MARYSVILLE KS
39-52-12 96-44-45

Dierking Communications, Inc.
610 N. 12th Street
Marysville KS 66508

119. MM Docket No. 89-251

276 LIC WGDN FM GLADWIN MI
43-57-3 84-30-34

Apple Broadcasting Company, Inc.
3601 W. Woods Rd
Gladwin MI 48624

120. MM Docket No. 89-252

276 CP KKEI IMPERIAL NE
40-32-30 101-42-30

Kathy J. Kautz
4521 25th Street
Columbus NE 68601

121. MM Docket No. 89-253

276 LIC KOFM ENID OK
36-26-14 97-55-15

Enid Quality Broadcasting Corp.
P.O. Box 5736
Enid OK 73702

122. MM Docket No. 89-254

276 LIC KRUN FM BALLINGER TX
31-43-31 99-57-42

Central West Broadcasting Co.
U.S. Highway 67
Ballinger TX 76821

123. MM Docket No. 89-255

280 LIC KSUA COLLEGE AK
64-51-32 147-49-41

Student Media, Inc.
P.O. Box 83831
Fairbanks AK 99708

124. MM Docket No. 89-256

280 LIC KJFP YAKUTAT AK
59-33-20 139-44-32

Lakeside Broadcasting, Inc.
Box 388
Yakutat AK 99689

125. MM Docket No. 89-257

280 LIC KNEI FM WAUKON IA
43-17-32 91-27-35

David H. Hogendorn
P.O. Box 151
Waukon IA 52172

126. MM Docket No. 89-258

280 LIC KNLV FM ORD NE
41-34-16 98-55-29

KNLV, Inc.
205 S. 16th
Ord NE 68862

127. MM Docket No. 89-259

280 LIC KVEZ SMITHFIELD UT
41-48-44 111-47-31

Ronald Christner Et.al.
1946 Metairie Road
Metairie LA 70005

128. MM Docket No. 89-260

280 LIC KVXO SPOKANE WA
47-41-52 117-31-7

Pacific Metrocom Northwest, Inc.
205 Palmetto Ave. #307
Merritt Island FL 32953

129. MM Docket No. 89-261

282 LIC KTOO JUNEAU AK
58-18-4 134-25-21

Capital Community Broadcasting
224 Fourth Street
Juneau AK 99801

130. MM Docket No. 89-262

285 CP KDOA TULIA TX
34-25-45 101-45-32

Dominion Communications, Inc.
230 W. 55th St.
New York NY 10020

131. MM Docket No. 89-263

288 LIC KWYD FM SECURITY CO
38-44-40 104-51-41

KWYD-FM Radio Partners
P.O.Box 5668
Colorado Springs CO 80931

132. MM Docket No. 89-264

288 LIC KELR FM CHARITON IA
41-00-50 93-17-23

Dwaine F. Meyer
810 Main Street
Pella IA 50219

133. MM Docket No. 89-265

288 LIC KMAV FM MAYVILLE ND
47-29-45 97-21-3

KMAV Radio, Inc.
P.O. Box 36 (Hwy 200 W)
Mayville ND 58257

134. MM Docket No. 89-266

292 LIC KSUP FM JUNEAU AK
58-18-6 134-26-29

KINY Associates
1107 W. 8th Street
Juneau AK 99801

135. MM Docket No. 89-267

292 LIC KRQS PAGOSA SPRINGS CO
37-11-32 107-05-55

ROD-MAR, Inc., Receiver
702 S. Tenth Street
Pagosa Springs CO 81147

136. MM Docket No. 89-268

292 LIC KRJB ADA MN
47-18-41 96-31-13

R & J Broadcasting
West Main Street
Ada MN 56510

137. MM Docket No. 89-269

292 LIC WMFG FM HIBBING MN
47-24-30 92-57-4

DNS Broadcasting, Inc.
P.O. Box 829
Hibbing MN 55746

138. MM Docket No. 89-270

292 CP WNMX NEWBERRY SC
34-19-38 81-32-42

Professional Radio, Inc.
2022 Forrest Street
Newberry SC 29108

139. MM Docket No. 89-271

292 LIC KTQN BELTON TX
31-03-46 97-31-54

Heart of Texas Communications, Ltd.
P.O. Box 240
Belton TX 76513

140. MM Docket No. 89-272

292 LIC KPAN FM HEREFORD TX
34-47-33 102-25-45

KPAN Broadcasters
Drawers 1757
Hereford TX 79045

141. MM Docket No. 89-273

292 LIC KLEN CHEYENNE WY
41-08-8 104-48-12

Blue Sky Broadcasting, Inc.
1416 Bradley Avenue
Cheyenne WY 82001

142. MM Docket No. 89-274

292 LIC KOTB EVANSTON WY
41-21-11 110-54-28

Evanston Broadcasting, Co., Inc.
P.O. Box 190
Evanston WY 82930

143. MM Docket No. 89-275

296 LIC KCID FM CALDWELL ID
43-39-51 116-38-10

Twin Cities Broadcasting Co.
921 Cleveland Blvd
Caldwell ID 83605

144. MM Docket No. 89-276

296 LIC KWLV MANY LA
31-36-36 93-23-58

WLV-TV, Incorporated
595 San Antonio Ave.
Many LA 71449

145. MM Docket No. 89-277

296 LIC KKDQ FOSSTON MN
47-33-44 95-43-30

North Country Radio, Inc.
P.O. Box 218
Thief River Falls MN 56701

146. MM Docket No. 89-278

296 LIC WLSM FM LOUISVILLE MS
33-07-20 89-01-5

Winston Broadcasting, Inc.
Hwy 15 Bypass, Drawer 30
Louisville MS 39339

147. MM Docket No. 89-279

296 LIC KSTA FM COLEMAN TX
31-51-16 99-25-36

Long Broadcasters, Inc.
2203 E. 13th
Odessa TX 79761

148. MM Docket No. 89-280

296 LIC KWKQ GRAHAM TX
33-07-37 98-35-35

KSWA, Inc.
P.O. Box 1050
Graham TX 76046

149. MM Docket No. 89-281

300 CP KBTB BETHEL AK
60-47-6 161-47-54

Bethel Communications, Inc.
22105 - 23rd Drive S.E.
Bothell, WA 98021

FOOTNOTES

[1] However, pursuant to 47 CFR § 1.419(c), the Commission will consider pleadings directed to more than one proceeding provided that additional copies are provided for inclusion in the record of each of the separate proceedings.

[2] Specifically, our proposals to upgrade Station KOWO at Waseca, Minnesota, and Station KATK at Carlsbad, New Mexico, involve overlap with, respectively, Station KAAL, Austin, Minnesota, and Station KVIO, Carlsbad, New Mexico.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 16, 1989

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELLSOUTH'S AMENDMENT TO ITS COMPARABLY EFFICIENT INTERCONNECTION PLAN FOR SYNCHRONOUS PROTOCOL PROCESSING SERVICES

On May 24, 1989, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth) filed an amendment to its comparably efficient interconnection (CEI) plan for synchronous protocol processing services on an unseparated basis. In its amendment, BellSouth requests permission to provide protocol conversion services in connection with its central office based local area network services (CO LAN), a basic service.

The Commission previously approved BellSouth's CEI plan for protocol processing services (4 FCC Rcd 1560 (1989)). However, BellSouth states that it is amending its plan to provide protocol conversion in association with its CO LAN. According to BellSouth, CO LAN is a data service which permits communication at various speeds among personal computers, business terminals and hosts, and other data networks. CO LAN performs the switching among the customers terminals and networks at the telephone company central office, thereby eliminating the customers' need to locate and maintain switching equipment on the premises.

As required in the Computer III proceeding (*Phase I Order*, 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, 3 FCC Rcd 1135 (1988)), the Commission must approve the CEI plan before BellSouth can begin implementing the proposed service. However, BellSouth states that the services it proposes to offer are essentially the same as those services described by Bell Atlantic in its CEI plan for protocol processing, which the Commission has approved (4 FCC Rcd 2744 (1989)).

BellSouth also describes its plans for complying with the other Computer III nonstructural safeguards governing the use of customer proprietary network information, nondiscrimination reporting, and nondiscriminatory provisioning. BellSouth notes that it has not selected the multiplexers it will use in its arrangement. However, once a selection is made, BellSouth will satisfy all of its network disclosure obligations before it offers the service.

Interested parties should file comments on this amendment by **July 6, 1986**, and reply comments by **July 20, 1989**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of BellSouth's amendment can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-119

In re Applications of

SILVER SPRINGS COMMUNICATIONS	File No. BPH-870630MS
A. P. WALTER, JR.	File No. BPH-870630MU
SILVER SPRINGS RADIO COMMUNICATIONS, LTD.	File No. BPH-870630MW
SILVER RADIO PARTNERS	File No. BPH-870630MX
SILVER SPRINGS BROADCSASTING, INC.	File No. BPH-870630MY
JIM JOHNSON	File No. BPH-870630MZ
MARK L. WODLINGER	File No. BPH-870630NC
SUN COAST COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870630NH

For Construction Permit for a
New FM Station on Channel 238A
in Silver Springs, Florida

ORDER

Adopted: May 26, 1989; Released: June 16, 1989

By the Commission:

1. Before the Commission for consideration are a Memorandum Opinion and Order, 3 FCC Rcd 5049 (1988); and an Application for Review filed September 21, 1988 by Silver Springs Broadcasting, Inc.

2. ACCORDINGLY IT IS ORDERED, That the Application for Review filed September 21, 1988 by Silver Springs Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ORION NETWORK SYSTEMS, INC. File No. I-T-C-89-078

Application for authority to acquire and operate facilities for service to the Federal Republic of Germany

ERRATUM

Released: June 16, 1989

By the Chief, International Facilities Division:

1. In an Order, Authorization and Certificate released May 24, 1989, (DA-89-553) the Commission, pursuant to delegated authority, authorized the above-captioned application. However, the authorization was inadvertently granted to Orion Network Systems, Inc. instead of OrionNet, Inc. which filed the application. Accordingly, the Commission's Order, Authorization and Certificate in the above-captioned matter is hereby corrected to reflect that the OrionNet, Inc. is the recipient of the grant of authority.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-182

In the Matter of

Automated Reporting Requirements
for Certain Class A and Tier 1
Telephone Companies (Parts 31,
43, 67 and 69 of the FCC's Rules)

ORDER

Adopted: June 2, 1989; Released: June 16, 1989

By the Chief, Common Carrier Bureau:

1. The Quarterly Report (FCC Report 43-01) established by the Commission in the *ARMIS Order* [1] provides, in summary form, the data needed to monitor the Tier 1 Local Exchange Carriers' revenue requirements, rates of return, jurisdictional separations and access charges. On January 6, 1989, the Chief, Common Carrier Bureau issued a revised Quarterly Report that incorporated changes required by the *ARMIS Reconsideration Order* and reflected the resolution of technical issues. The next Quarterly Report is scheduled to be filed on June 30, 1989. After consultation with industry representatives, we have determined that some additional minor edits to the Quarterly Report are required. An *Errata* containing the fully revised report will be issued soon, but not in time to allow the filing carriers thirty days to complete the report before the June 30 filing date.

2. Accordingly, the filing date for the June 30, 1989, Quarterly Report IS EXTENDED to thirty days from the release date of the *Errata*.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67 and 69 of the FCC's Rules), 2 FCC Rcd 5770 (1987) (*ARMIS Order*), *modified on recon.*, 3 FCC Rcd 6375 (1988) (ARMIS *Reconsideration Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-492

In the Matter of

Amendment of Section 73.202(b), RM-5390
Table of Allotments,
FM Broadcast Stations.
(Siloam Springs, Arkansas)

MEMORANDUM OPINION AND ORDER

Adopted: May 30, 1989; Released: June 16, 1989

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration a Petition for Reconsideration, filed by John Brown University ("JBU"), licensee of noncommercial educational Station KLRC(FM), Siloam Springs, Arkansas, of the decision by the Chief, Policy and Rules Division, which substituted reserved FM Channel 266A for Channel 212A and modified its license accordingly. *See Report and Order*, 2 FCC Rcd 7485 (1987).

2. JSU's proposal to substitute FM Channel 266A for Channel *212A was premised on petitioner's desire to improve its facilities. Before JSU submitted its proposal, JSU attempted to increase its power on Channel *212A in the educational band. However, Station KOTV(TV) (Channel 6), Tulsa, Oklahoma, objected, claiming that the proposed improvement would interfere with the reception of its signal. As a consequence of Station KOTV's objection, compounded with the stated unavailability of other channels within the educational band on which to achieve equivalent Class A facilities, JBU sought modification of its license to specify a channel in the nonreserved band to accomplish its goal. Thereafter, we proposed to allot Channel 266A to Siloam Springs and delete Channel *212A to avoid Intermediate Frequency (IF) Interference with Channel 266A at JBU's proposed transmitter site. However, we inadvertently proposed the allotment without reservation of the channel for non-commercial educational use.

3. In the *Report and Order*, we corrected the oversight and allotted Channel 266A on a reserved basis despite the fact that JBU had not specifically requested a reserved channel. We specifically noted that Channel 266A was inadvertently proposed as a commercial channel and that it would be contrary to the public interest to eliminate without replacement the only reserved channel in the community. We further noted that the Commission's policy generally does not permit the use of the commercial band for a non-commercial educational station, except where channels in the reserved portion of the FM band (Channel 201-220) are not available due to TV Channel 6 interference or foreign use of the noncommercial educational band. The Commission cited its action in *Roswell, New Mexico*, 2 FCC Rcd 6924 (1987) and *Lindside, West Virginia*, 2 FCC Rcd 6046 (1987), where the Commission allotted reserved channels in the commercial band when it was determined that due to TV Channel 6 interference there were no noncommercial channels which could be used in compliance with the Commission's interference guidelines as set forth in *Docket No. 20735*, 58 RR 2d 629 (1985).

4. We found that the same situation existed in Siloam Springs as in *Roswell* and *Lindside*. JBU's proposed increase in facilities would create TV Channel 6 interference and no other noncommercial channels were available. In granting the proposed allotment of Channel 266A in Siloam Springs, we noted that in the above cases, the commercial channel had been reserved in order to preserve the availability of educational programming in the respective communities. Although JBU did not specifically request the use of an unreserved commercial channel or provide a basis for allotting Channel 266A without the reservation, we stated our belief that it would be contrary to the public interest to eliminate without replacement the only reserved channel in Siloam Springs. Moreover, we believed that reserving Channel 266A would assure retention of the only outlet in Siloam Springs for the presentation of educational programming.

5. In its Petition for Partial Reconsideration, JBU primarily contends that the Commission should reconsider its action in Siloam Springs and remove the reservation on Channel 266A because the Commission failed to propose a noncommercial reservation for Channel 266A in the *Notice*. JBU claims that by omitting the proposed reservation in the *Notice*, then allotting Channel 266A as a reserved channel, JBU has been denied the opportunity to provide a basis to allot Channel 266A as a commercial channel.

6. JBU argues that the Commission was incorrect in assuming that it wanted a noncommercial allotment. JBU contends that it was always its intention that KLRC be modified to operate on a commercial channel. JBU alleges that it eventually contemplates providing commercial service on the station in order to benefit the University's students. JBU states that the value of the station as a capital asset of the University will be enhanced by permitting the station to operate on a commercial channel. In support JBU cites *Sioux Falls, South Dakota*, 51 FR 4169 (1986), where the Commission granted a proposal to modify a noncommercial educational station from a reserved to a nonreserved channel with no opposition. JBU argues that, as in *Sioux Falls*, in the instant situation the public had notice that the Commission intended to substitute Channel 266A on a nonreserved basis and no adverse comments were filed. Finally, JBU contends that the Commission's reliance on *Roswell, New Mexico* and *Lindside, West Virginia* is inapposite, since in both cases, the petitioners requested the reservation of channels in the commercial band. JBU reiterates that it made no such request here.

7. We believe in light of the Commission's policy regarding the use of the commercial band for noncommercial educational stations, our action in Siloam Springs was proper. Furthermore, contrary to petitioner's arguments, our action reserving Channel 266A for noncommercial educational use was not dependent on whether the petitioner specifically requested the reservation. Finally, despite the fact that the *Notice* did not propose the reservation of Channel 266A for

noncommercial educational use. JBU has failed to provide a basis for allotting Channel 266A without the reservation.

8. As we stated in the *Report and Order*, commercial channels are generally not reserved for noncommercial educational use in allotment proceedings. Exceptions to this policy have generally fallen into two categories: (1) channels in the noncommercial educational band are precluded due to the presence of Canadian or Mexican allotments; or (2) the use of channels in the noncommercial band may result in potential interference to television operations on VHF television Channel 6. *See Comobabi, Arizona*, 47 FR 32717 (1982); *Burlington and Newport, Vermont*, 45 RR 2d 786 (1979). Further exceptions to this policy have also been made where the proposed allotment would be an integral part of a state educational radio network, no other educational channels were available, and the use of the channel for educational purposes was more in the public interest than a proposed commercial use of the frequency. *See Presque Isle, Maine*, 36 RR 2d 840 (1976); *Waco, Texas*, 10 FCC 2d 865 (1967); *Burlington and Newport, Vermont, supra*. In this case, we determined that since JBU's proposed improvement on Channel 212 would cause prohibited interference to Station KOTV, Channel 6, Tulsa, Oklahoma, and there were no other noncommercial channels available at Siloam Springs, it was in the public interest and consistent with Commission policy to reserve a commercial channel for noncommercial use. Although JBU claims that the Commission's failure to propose Channel 266A on a reserved basis denied it an opportunity to provide a basis to allot Channel 266A as a commercial channel, on reconsideration JBU has not provided any valid reasons why it would be in the public interest to risk losing future noncommercial service in Siloam Springs by removing the only noncommercial channel.

9. Our purpose in retaining a noncommercial reservation on Channel 266A in Siloam Spring is to preserve noncommercial educational service in that community. *See Vancouver, Washington*, 44 FR 43495 (1979) and *Kalamazoo, Michigan* 44 FR 4273 (1979). In *Sioux Falls*, where we modified the noncommercial licensee to a commercial channel without reservation we stated that our general policy did not apply in this particular situation since neither foreign usage nor TV Channel 6 interference was a factor. We did note, however, that Sioux Falls received commercial FM service from five local stations and noncommercial service from four stations licensed on the noncommercial band. Therefore, we granted the modification based on the availability of several additional commercial channels and the existence of additional noncommercial outlets. None of the above factors exist in Siloam Springs. Moreover, the allotment of the commercial channel in *Sioux Falls* did not signal the end of the only reserved channel in the community as it would in Siloam Springs. While part of the petitioner's rationale for requesting the modification in *Sioux Falls* was to eventually provide commercial service, there is no evidence that the same countervailing factors exist in Siloam Springs *(i.e.* the availability of other noncommercial and commercial channel for other interested parties) that were dispositive in *Sioux Falls*.

10. Finally, JBU argues that the Commission's reliance on *Roswell, New Mexico* and *Lindside, West Virginia* is misplaced since in both cases the petitioner's specifically requested the reservation of channels in the commercial FM band. Again, JBU reiterates that it did not request a noncommercial reservation. However, JBU misses a crucial point in both cases and in the instant situation. While the Commission in *Roswell* and *Lindside* did consider the petitioners' interest in operating a noncommercial educational facility, the respective allotments were made due to the unavailability of noncommercial channels that would not cause TV Channel 6 interference, not merely because of a specific expression of interest by the petitioners. Similarly in this case, the Commission's action reserving Channel 266A was not dependent on JBU's specific request for a noncommercial channel but based on the fact that there were no other channels available within the educational band that would not create TV Channel 6 interference.

11. If Channel 266A were allotted on a non-reserved basis as requested by the petitioner, the channel substituted would not be an equivalent channel. The new allotment would not fall within any established exception to the general rule that new allotments are made available for general application. *See Modification of FM and TV Station Licenses*, 98 FCC 2d 916 (1984), *Modification of FM Broadcast Licenses to Higher Class Co-Channel or Adjacent Channels*, 60 RR 2d 114 (1986) and *First Report and Order* in MM Docket No. 85-144, 2 FCC Rcd 660 (1987). Accordingly, we would be required to make the new allotment available for general application. We do not believe this is a result contemplated by JBU, since JBU expressly requested modification of its license to specify operation on Channel 266A. The premise for our finding that allotment to Siloam Springs and modification of JBU's license would serve the public interest was that JBU could not expand noncommercial service in the noncommercial band. Absent use of Channel 266 for noncommercial purposes, we are unable to find that the modification of JBU's license would provide sufficient public interest benefits to warrant foreclosing the filing of competing applications for Channel 266A at Siloam Springs.

12. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by John Brown University, IS DENIED.

13. For further information concerning this proceeding, contact Arthur Scrutchins, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-182

In the Matter of

Automated Reporting Requirements
for Certain Class A and Tier 1
Telephone Companies (Parts 31,
43, 67, and 69 of the FCC's Rules)

ERRATUM

Released: June 16, 1989

By the Chief, Common Carrier Bureau:

1. On May 11, 1989, the Chief of the Common Carrier Bureau released an Order, DA 89-525, revising the Access Report (FCC Report 43-04) of the Commission's automated reporting system.[1] Paragraph 3 of that Order did not indicate that the revised report was being submitted to the Office of Management and Budget for approval. In addition, the estimated burden hours shown in the attachment to the Order were incorrectly stated and the last two sections of the Order were numbered incorrectly. To correct the Order, this *Erratum* makes the following changes.

2. Paragraph 3 is revised to read as follows:

> 3. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a modified information collection requirement on the public. Implementation of any modified requirement will be subject to approval by the Office of Management and Budget as prescribed in the Act.

3. The estimated average burden hours per response shown on page 1 of FCC Report 43-04 - Report Definition - Summary attached to the Order is revised from 115 hours to 1150 hours.

4. Section IV is renumbered Section III, and Section V is renumbered Section IV.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67 and 69 of the FCC's Rules), 2 FCC Rcd 5770 (1987) (*ARMIS Order*), *modified on recon.*, 3 FCC Rcd 6375 (1988) (ARMIS *Reconsideration Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-148

In the Matter of

Amendment of Section 73.202(b),	RM-6033
Table of Allotments,	RM-6101
FM Broadcast Stations.	
(Ariton, Alabama and	
Bonifay, Florida)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: May 3, 1989; Released: June 16, 1989

By the Chief, Allocations Branch:

1. The Commission has before it a Petition for Reconsideration and Motion for Stay (the "Petition") regarding the *Report and Order* in MM Docket No. 88-148, 4 FCC Rcd 1182 (1989), filed by Patsy Nance Marsh and Rickey Earl Nance ("Marsh and Nance").[1]

2. The Commission subsequently received a request from Marsh and Nance for dismissal of their Petition. Marsh and Nance state that they have no further interest in pursuing an allotment in Ariton, and do not object to the conclusions of the *Report and Order* in this proceeding.

3. Accordingly, IT IS ORDERED, That the Petition for Reconsideration and Motion for Stay filed by Patsy Nance Marsh and Rickey Earl Nance IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Public Notice was given on March 15, 1989, Report No. 1770.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-223

In re Applications of

RICHARD P. BOTT, II	File No. BPH-850711MM
RADIO REPRESENTATIVES, INC.	File No. BPH-850711MO
CLARE MARIE FERGUSON	File No. BPH-850712MS

For Construction Permit for a New FM Station at Blackfoot, Idaho

Appearances

Barry A. Friedman, and *Michael Drayer*, on behalf of Richard P. Bott, II; *Dan J. Alpert*, on behalf of Radio Representatives, Inc.; *J. Dominic Monahan*, and *Thomas J. Hutton*, on behalf of Clare Marie Ferguson; and *Y. Paulette Laden*, on behalf of the Chief, Mass Media Bureau.

DECISION

Adopted: May 23, 1989; Released: June 5, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member BLUMENTHAL:

1. By *Hearing Designation Order*, 2 FCC Rcd 3897 (1987) (*HDO*), the Chief, Audio Services Division, designated the captioned applicants (along with four others subsequently dismissed) for consolidated comparative hearing to determine the best qualified applicant to operate a new Class C FM facility (on Channel 268C) at Blackfoot, Idaho. In addition to the standard comparative issue (including comparative coverage), the *HDO* specified "air hazard" issues with respect to the proposed tower sites of Richard P. Bott, II (Bott) and Clare Marie Ferguson (Ferguson). A "site availability" issue was later added by presiding Administrative Law Judge Edward Luton (ALJ) against Ferguson. *Memorandum Opinion and Order*, FCC 87M-2524, released October 9, 1987. However, that issue, along with the "air hazard" issue, was resolved in favor of Ferguson by summary decision. *Order*, FCC 87M-3238, released December 10, 1987. The "air hazard" issue against Bott was resolved in its favor by summary decision (Tr. 16).

2. Now before the Board are the *Initial Decision*, 3 FCC Rcd 7094 (1988)(*I.D.*) of the ALJ, the exceptions and replies thereto filed by Bott, Ferguson and Radio Representatives, Inc. (RRI), as well as a reply to Bott's "Statement in Support of Initial Decision and Contingent Limited Exceptions," filed by the Commission's Mass Media Bureau (Bureau). Having reviewed these pleadings, the record of the hearing proceedings below, and having heard oral argument of the parties on April 14, 1989, we affirm the *I.D.*, except as modified herein, and affirm the grant of Bott's application.

TRANSMITTER SITE AMENDMENTS

3. *BOTT* : On August 26, 1987, Bott filed with the ALJ a petition for leave to amend its transmitter site proposal, substituting Lot 12 for its originally-proposed site on Lot 6 of Howard Mountain, an area administered by the U.S. Bureau of Land Management (BLM). Bott's amendment petition contained a showing of (1) due diligence; (2) involuntariness; (3) no need to add issues or parties; (4) no disruption to hearing; (5) no prejudice to other parties; and (6) no comparative advantage to applicant. *See Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970) ("good cause" test for application amendments); *see also* 47 CFR § 73.3522(b). Bott's amendment petition additionally asserted a demonstration of "unforeseeability," pursuant to subsection 73.3522(b)(l)(i). On September 4, 1987, the Bureau commented favorably on the proposed Bott amendment. However, on September 15, 1987, RRI opposed Bott's petition, claiming that Bott was not diligent and that the need for the site amendment was clearly foreseeable. The ALJ rejected RRI's arguments and granted the Bott petition. *Memorandum Opinion and Order*, FCC 87M-2525, released October 9, 1987. In its exceptions to the Board, RRI renews its claims of foreseeability and lack of due diligence, urging reversal of the ALJ's acceptance of Bott's transmitter site amendment. We shall deny this exception.

4. It is undisputed that, before filing its application on July 11, 1985, and certifying therein that it had "reasonable assurance" of its proposed transmitter site on Lot 6, Bott was expressly advised by a BLM communications specialist that Lot 6 was available for its use.[1] Subsequently, on September 17, 1985, the Howard Mountain Users Association, an organization consisting of all radio communications users with facilities on Howard Mountain (as well as a BLM representative), adopted a recommendation that Lots 2, 6, and 7 be reserved by BLM only for low power communication sites; and that Lots 11, 12, and 13 be set aside for high power users (such as Bott's proposed commercial FM radio station).[2] Bott claims and RRI does not contest (1) that a Users Association recommendation does not bind the BLM, unless and until the BLM adopts the recommendation as its own policy; and (2) that Bott actually did not become aware of the Association recommendation until August 1987. *Compare* RRI Br. at 7 *with* Bott Reply Br. at 9-10.

5. The heart of RRI's instant attack is that the BLM adopted the Users Association recommendation in March 1986, thereby making Lot 6 unavailable to Bott at that time; and that had Bott actually filed a formal application with BLM for permission to use Lot 6, it would have been informed of this changed circumstance some eighteen months before August 1987. RRI Br. at 7-9. Therefore, submits RRI, Bott lacked due diligence in permitting the eighteen-month gap to intervene before filing his August 1987 amendment, because its need to abandon its Lot

6 transmitter site became "foreseeable" no later than March 1986. As a matter of fact and law, we must disagree.

6. The record does not establish that BLM adopted the Users Association recommendation in March 1986, despite RRI's reliance upon a September 10, 1987 letter from BLM Idaho Falls District Manager to RRI's counsel.[3] That letter states that the:

> user group recommendation was later discussed at a [BLM]-wide Site Management Committee Meeting in March of 1986. Communication specialists at this meeting basically agreed that authorized site managers would be *encouraged* to consider high power communication site requests only on the higher available lots of established communication sites. As mentioned in our July 30, 1987 letter, *authorized managers are not bound by this recommendation.* However, we feel the Howard Mountain Users Association recommendation has merit. Therefore, *at the present time* we do not plan to authorize high power users . . . to locate on lots 2, 6, and 7 of Howard Mountain. [Emphasis added.]

This BLM letter is not clear that Lot 6 became proscribed to applicants in March 1986. Although the matter was "discussed" at that time, BLM site managers were "not bound by this recommendation." Also, this letter plainly states that "at the present time" (*i.e.*, September 10, 1987), Lot 6 was not planned for high power users.

7. In some contrast, that same BLM District Manager had earlier written to RRI counsel (on July 30, 1987) and to Bott (on August 3, 1987)[4]:

> Although this recommendation [to reserve lots 2, 6, and 7 for low-power communication sites] is not binding on [BLM], we do carefully consider measures to protect existing users from outside interference. We will consider high-power communication site right-of-way application requests for Howard Mountain lots 11, 12, or 13.

These two 1987 BLM letters did formally leave open the possibility that Bott's original Lot 6 proposal could be approved; but Bott, upon receiving the August 3 letter, responded to BLM's concern and promptly (within three weeks) filed an amendment to specify use of Lot 12 instead of Lot 6. Therefore, the record does not establish that a BLM policy change terminated Bott's "reasonable assurance" of its original transmitter site in March 1986. Conversely, it does establish that Bott promptly moved to relocate to Lot 12 when it became aware, in August 1987, of BLM encouragement to do so, and we affirm the ALJ's finding that Bott demonstrated due diligence in amending. *See Elijah Broadcasting Corp.*, 3 FCC Rcd 5148, 5151 (Rev. Bd. 1988); *Horizon Broadcasting, Inc.*, 103 FCC 2d 656, 659 (Rev. Bd. 1986). We similarly find that the Users Association recommendation (and eventual BLM adoption) of a policy that would make Bott's original site unavailable to him were not "foreseeable" circumstances requiring earlier action by Bott, so we accord with the ALJ's "unforeseeability" finding. In sum, the ALJ properly accepted Bott's August 26, 1987 site amendment, because it was a prompt and reasonable response to a BLM policy change regarding use of Howard Mountain as an FM radio station transmitter site.

8. *FERGUSON:* RRI similarly excepts to the ALJ's ruling granting Ferguson's October 23, 1987 "Petition for Leave to Amend" to specify a new transmitter site. *See Memorandum Opinion and Order*, FCC 87M-3063, released November 25, 1987. It submits that, although Ferguson's application was filed on July 12, 1985, and a notice of its transmitter proposal was mailed to the FAA on July 8, 1985, the FAA responded on July 31, 1985 and advised Ferguson that:

> we object to the construction of the proposed station due to its proximity to our facilities. However, if you will state in writing that the transmitter and antenna system will reduce spurious emissions by 86 db instead of the FCC specified 80 db, and the owner will shutdown the transmitter immediately if a problem occurs, we will withdraw our objection. Meanwhile the proposal is presumed to be a hazard to air navigation.

See RRI Br. at 11. Approximately two years later, on July 17, 1987, Ferguson's engineering consultant wrote to the FAA, there agreeing to accept the FAA conditions. However, because the FAA ultimately determined that the *original* Ferguson proposal constituted "a hazard to air navigation," RRI Opposition, filed November 3, 1987, Att. 4 (FAA letter of July 28, 1987 to Ferguson's engineering consultant), RRI urges that Ferguson's two-year hesitation in responding to the FAA demonstrated a lack of due diligence, thus vitiating any "good cause" for its later October 23, 1987 transmitter site amendment.

9. If RRI's chronology were complete, we might well agree with its conclusion adverse to Ferguson. *See Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027 (Rev. Bd. 1983), *review denied*, FCC 84-119, released April 2, 1984, *aff'd mem. sub nom. Royce Intern. Broadcasting Co. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985) (Table), *cert. denied*, 474 U.S. 995 (1985). However, RRI fails to acknowledge that Ferguson's July 17, 1987 acceptance of the FAA conditions came within thirty days of the *HDO's* specification of an air hazard issue, and would (as a qualifying amendment) likely have been accepted as a matter of right. *See* 47 CFR § 73.3522(b)(2). Further, the record shows that, upon receiving Ferguson's assent to the specified (86 db) conditions, the FAA promptly determined (on July 23, 1987) that Ferguson's proposal was *not* an obstruction. *See* "Opposition to Motion to Enlarge Issues," filed August 25, 1987, Ex. 2 (FAA "Notice of Proposed Construction or Alteration" (appended to Ferguson's Engineering Statement)). Five days later, however, the FAA "developed additional information pertaining to intermodulation problems which could be caused by this new facility"; and, the FAA reversed course, finding the original Ferguson proposal to be *per se* an air hazard. RRI "Opposition to Petition for Leave to Amend," filed November 3, 1987, Att. 4 (FAA letter of July 28, 1987 to Ferguson's engineering consultant). It was this latter event that gave Ferguson actual notice that an amendment was required, and diligent replacement of the original site was indicated. *See Brownfield Broadcasting Corp.*, 88 FCC 2d 1054, 1058 (1982). Upon receipt of this second FAA

letter, which was not shown to be foreseeable, Ferguson immediately set about procuring a new site, and the time running from August through October 1987 was spent negotiating -- ultimately successfully -- with the owner of the new site for "reasonable assurance" of that replacement site. "Petition for Leave to Amend," filed October 23, 1987, at 3-4. The hearing in this case, it is noted, did not begin until December 2, 1987, and was not delayed or disrupted in any way by the pertinent chain of events. *I.D.*, para. 4. Therefore, we affirm the ALJ's determination that Ferguson was duly diligent and had "good cause" to amend its transmitter site proposal on October 23, 1987. *See Elijah Broadcasting, supra.*

COMPARATIVE ATTRIBUTES:

DIVERSIFICATION OF CONTROL OF THE MASS MEDIA

10. The ALJ assessed moderate diversification demerits against Bott and Ferguson, and also assessed a "slight-to-moderate" demerit against RRI, for their respective attributable ownership interests in mass media properties. *I.D.*, para. 59. He further found these comparative differences amongst the applicants to be insignificant relative to the more pronounced differences in their respective credits for integration of ownership and management. *Id.*, paras. 59-60. Each of the three applicants excepts to the ALJ's diversification analysis. While we shall modify that analysis somewhat, *infra*, we nevertheless agree with the ALJ that the diversification differences among the applicants in this case are outweighed by the more substantial differences among their ownership/management "integration" credits.

11. Attributable ownership interests in the mass media are "more significant in the degree that they:

> (a) are larger, *i.e.*, go towards complete ownership and control; and to the degree that the existing media:
>
> (b) are in, or close to, the community being applied for;
>
> (c) are significant in terms of numbers and size, *i.e.*, the area covered, circulation, size of audience, etc.;
>
> (d) are significant in terms of regional or national coverage; and
>
> (e) are significant with respect to other media in their respective localities."

Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393, 395 (1965). "Less than controlling ownership interests and significant managerial positions in stations and other media within and without such areas will be considered when held by persons with any ownership or significant managerial interest in an applicant." *Id.*, at 394 n. 5.

12. *BOTT:* Bott, a sole proprietor, (1) is the 100% owner of Station KCIB(FM), Central Valley, California, and (2) has a 20% ownership interest in each of Station KSIV-AM, Clayton, Missouri, Station KCIV(FM), Mt. Bullion, California, as well as two FM construction permits for stations at Goodland and Hastings, Nebraska.[5] Moreover, Bott is an officer and director of (but owns no equity in) the licensees of Station KCCV(AM), Independence, Missouri, Station KQCV(AM), Oklahoma City, Oklahoma. Station WFCV(AM), Fort Wayne, Indiana, and Station WCRV(AM), Collierville, Tennessee.[6] These various stations range from about 514 miles (Central Valley, California) to about 1,280 miles from the proposed community of license, Blackfoot, Idaho. *See I.D.*, paras. 9-17, 39; Bott Petition for Leave to Amend, filed December 12, 1988. *See also* Bott Br. at 6-7.

13. *RRI:* The record reflects that RRI was the permittee of daytime-only Station KIDH(AM), Eagle, Idaho (approximately 130 miles from Blackfoot) and of Station KGDP(AM), Orcutt, California (approximately 800 miles from Blackfoot). In addition, 33 1/3% of RRI's ownership has, in turn, a 50% ownership stake in the licensee of Station KIRV(AM), Fresno, California (approximately 700 miles from Blackfoot). *I.D.*, paras. 18-19, 41; *see also* RRI Br. at 20; Bott Br. at 10-11.

14. *FERGUSON:* Ferguson is the permittee of Station KCMB-FM, Baker, Oregon (approximately 295 miles from Blackfoot). *I.D.*, para. 23; Ferguson Exh. 3. Additionally, at the critical "B" cut-off deadline, Ferguson's husband, David N. Capps (together with his minor children from a previous marriage), owned 100% of the stock in the licensee of Stations KSRV-AM/FM, Ontario, Idaho (approximately 233 miles from Blackfoot) and Stations KEZJ-AM/FM, Twin Falls, Idaho (approximately 94 miles from Blackfoot). *I.D.*, para. 23; *see also* Bott Br. at 12. On November 12, 1987, less than one month before the hearing (but long after the "B" cut-off deadline), an application was filed requesting Commission consent for the assignment of the licenses of the two Twin Falls stations to B & B Broadcasting, Inc. *I.D.*, para. 23.

15. In her exceptions, Ferguson suggests that the Board take cognizance of the post-hearing sale of her husband's Twin Falls stations, and lighten her diversification demerit accordingly. Ferguson Br. at 10 n. 4. This we cannot do.[7] Two discrete Commission policies conjoin to require that the nearby Twin Falls stations be attributed to Ferguson for our media diversification analysis: *First* is the Commission's spousal attribution doctrine which presumes "a clear community of interest" between ordinary husband and wife, so that the media interests of one spouse are attributed to the other for media diversification comparisons. *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 426 (1981); *Lady Sarah McKinney - Smith*, 59 FCC 2d 398, 401 (1976); *second* is the doctrine that an applicant cannot improve its relative comparative position as against competing applicants by voluntary changes occurring after the so-called (pre-hearing) "B" cut-off date, so as to preclude gamesmanship, unfairness, and an unending chain of application changes that would ever prevent a comparison on a static basis. The court is fully familiar with the Commission's taut policy against comparative upgrading. *Allied Broadcasting, Inc. v. FCC*, 435 F.2d 68, 70 n. 9 (D.C. Cir. 1970); *Cellular Mobile Systems of Pennsylvania v. FCC*, 782 F.2d 182, 210 n. 56 (D.C. Cir. 1985); *see also Daytona Broadcasting Co., Inc.*, 97 FCC 2d 212, 214-219 (Rev. Bd. 1984) (subsequent history omitted) (discussing at length the perils of comparative upgrading). We discuss below these two separate policies, and their combined impact on Ferguson's media diversification position.

16. *Spousal Attribution.* As indicated, the case law firmly holds that the media interests of one spouse will be attributed to the other, *Klein*, 86 FCC 2d at 426; *McKinney - Smith*, 59 FCC 2d at 401, reflecting a long-

standing Commission policy that has been sustained even over constitutional challenge. *See Cannon Communications Corp.*, 101 FCC 2d 169, 178 & n.23 (Rev. Bd. 1985), *review denied*, FCC 86-244, released May 15, 1986 (subsequent history unrelated to spousal attribution omitted), for an enlarged discussion of this general policy. However, as the Board acknowledged in *Cannon*, the Commission's *Ownership Attribution Rules*, 58 RR 2d 604, 620 (1985) (*on reconsideration*), did modify the *Klein/McKinney - Smith* line of cases by declaring that, although it had theretofore regarded its spousal attribution presumption as of "nearly conclusive stature," the agency would "henceforth permit this presumption to be rebutted, on a case-by-case basis, in appropriate circumstances." Insofar as the Board is aware, the Commission has not fleshed-out the standards by which one spouse might successfully avoid the constructive attribution of the other's media interests, nor has this Board (or the full Commission) handled an adjudicatory case in which the ordinary spousal attribution presumption has been overcome.[8] At a minimum however, we believe that, to rebut the subject presumption, the Commission would demand a special showing of the following nature[9]:

> (i) that the spouse seeking to avoid attribution of the other's media interests demonstrate no prior interest or involvement by the other spouse in those media properties; (ii) that the applicant spouse show a history of individual and separate business interests; (iii) that the applicant spouse is the sole financial force behind the application; (iv) that the non-applicant spouse has not participated in the application process and will not participate in station affairs in any way; and (v) that the non-applicant spouse holds no current equity interest in the applicant entity, either active, passive, or through any form of joint ownership.

17. At bar, Ferguson seeks to avoid the conventional spousal attribution presumption by interposing an antenuptial agreement between Ferguson and Capps, which document purports to preserve his Twin Falls and Ontario stations exclusively to him and the children of his prior marriage. However, we find this agreement -- standing alone -- wholly insufficient to forefend the spousal attribution doctrine. As discussed in greater detail in a forthcoming section affecting Ferguson's ownership/management "integration credit (*see infra*. paras. 23-26), the actual conduct of Ferguson and Capps have demonstrated *anything but* the type of non-involvement in each other's media affairs we would find necessary to rebut the spousal attribution presumption. *E.g.*, not only was Ferguson herself employed at Capps' Twin Falls stations from June 1981 until its very recent divestiture, holding the senior sales position for the latter five years, *I.D.*, paras. 30-31, but Capps has been heavily involved in the preparation, prosecution, and financing of Ferguson's instant Blackfoot application, as well as that of her Baker Idaho, station, *id.*, para. 55. Thus, Ferguson's argument to be spared the imposition of the spousal attribution doctrine is weak, because the Ferguson spouses' media interests are Idaho-mashed together beyond meaningful separation.

18. *Comparative Upgrading*. The next question is whether Ferguson should be relieved, nevertheless, of the diversification onus of the two Twin Falls stations. Ferguson does not directly dispute that, *assuming* the ordinary spousal attribution dynamics obtain, her husband's voluntary sale of these stations *after* the deadline for comparative upgrading would not be credited to her relative advantage. Rather, she equates her husband's sale of the Twin Falls stations to those cases in which there has been a change in "core circumstances," and submits that the Board must officially notice this ownership change, reducing her diversification assessment accordingly. Those cases pertain to situations in which, after the close of the record (and sometimes even after issuance of a Commission decision), the "core circumstances" critical to the decisional outcome have changed. *See, e.g., Crosthwait v. FCC*, 584 F.2d 550 (D.C. Cir. 1978); *Greater Boston Television Corp. v. FCC*, 334 F.2d 552 (D.C. Cir. 1964) (death of principal); *Southland Television Co. v. FCC*, 266 F.2d 686 (D.C. Cir. 1959) (death of principal); *W. S. Butterfield Theatres v. FCC*, 237 F.2d 552, 556 (D.C. Cir. 1956) (change in programming and facilities); *Enterprise Co. v. FCC*, 231 F.2d 708 (D.C. Cir. 1955) (merger), *cert denied*, 351 U.S. 920 (1956); *Fleming v. FCC*, 225 F.2d 523 (D.C. Cir. 1955) (death of principal); *Warmac Communications, Inc.*, 2 FCC Rcd 5318 (1987) (grant of another construction permit for one of the two communities); *Golden State Broadcasting Corp.*, 102 FCC 2d 797 (1985) (grant of 3 new construction permits for community); *Daytona Broadcasting*, 97 FCC 2d at 225-230 (more recent decennary Census data); *cf. Greater Boston Television Corp v. FCC*, 463 F.2d 268 (D.C. Cir. 1971) (court denies Commission request to recall mandate). While those cases generally refuse to permit comparative upgrading based on an applicant's voluntary actions, *Klein*, 86 FCC 2d at 434, they do recognize comparative downgrading based on such actions, *see, e.g., Butterfield*, 237 F.2d at 556; *Enterprise*, *supra*, and do recognize involuntary changes that directly affect the rationale of the decision. *See, e.g., Warmac*, 2 FCC Rcd at 5318-5319 (where Review Board had found no Section 307(b) differences between applicant for community "A" and applicants for community "B", but found the "A" applicant to be comparatively superior, the full Commission took cognizance of a supervening grant in another proceeding for an FM station construction permit for community "B", thus awarding the "A applicant a decisive Section 307(b) preference); *Golden State, supra* (remanded because supervening grants of 3 new FM station construction permits undermined decisive "comparative coverage" preference awarded by Board). Here, the posture is markedly different from the "core circumstances" line of cases, because the divestiture of Ferguson's two Twin Falls stations occurred *before* the close of the record. The ALJ routinely noted this post-"B" cut-off divestiture, but nevertheless held that the two Twin Falls stations must still be attributed to Ferguson in order to prevent impermissible comparative upgrading, despite Ferguson's argument that Capps' divestiture of the stations was "involuntary" with respect to her, and that she be permitted to upgrade. *See* Ferguson Reply Findings of Fact and Conclusions of Law, filed March 4, 1988, at 9-11. Ferguson renews this argument in her exceptions to the Board. Ferguson Br. at 10 n. 4.

19. We reject Ferguson's creative invocation of the "changed core circumstance" line of cases. Under the essential doctrine of spousal attribution, the law requires that the media interests of her husband be treated *as if* they were her own, *see, e.g., Klein*, 86 FCC 2d at 426-427; *Cannon Communications*, 101 FCC 2d at 178-179. As if they were her own, a *post* "B" cut-off divestiture would

not be considered for comparative purposes. *See Muncie Broadcasting Corp.*, 89 FCC 2d 123, 129-130 (Rev. Bd. 1982), *review denied*, 54 RR 2d 42 (1983), *remanded on other grounds*, 98 FCC 2d 164 (1984). Here, Ferguson makes the seductive argument that, inasmuch as she neither owned nor controlled the Twin Falls stations, the eleventh-hour sale of those stations is an extrinsic, fortuitous event -- a "changed core circumstance as it were -- that we should accept without charging *her* with a late divestiture. Yet, to the extent that Ferguson claims that the decision to sell, *vel non*, the stations was out of her hands, it strikes us as inconsistent that she seeks a comparative *benefit* resulting from that late divestiture. While we concede, *arguendo*, that it may seem facially anomalous to charge her with media interests whose disposition, and the timing thereof, was putatively in her husband's province, her fundamental argument here goes to the heart of the spousal attribution doctrine. Hence, it is not the late *divestiture* of the stations, *per se*, that causes her problem; rather it is the *attribution* of those two stations in the first instance. Were we to accept Ferguson's argument that the divestiture was an independent act of her husband that should not be attributed to her, we would need *first* to regard those stations as *solely* the burden of her husband, thus vitiating the bedrock presumption underlying the Commission's well-established spousal attribution doctrine. In other words, were we to regard her husband's ownership of the Twin Falls stations as something wholly separate and apart from Ferguson, the critical premise for the essential spousal attribution disintegrates entirely. This we may not do. While the workings of the spousal attribution doctrine always cut against the interests of the non-owning spouse in comparative diversification analyses, Ferguson is here no worse off, comparatively, for her husband's divestiture of the Twin Falls stations than she would have been had he *not* divested of those stations. Accordingly, Ferguson can not be upgraded by the *post* "B" cut-off divestiture of those two stations.

DIVERSIFICATION ANALYSIS

20. Having addressed these exceptions, we must now compare the mass media ownership interests of the three applicants, as they have been described in paras. 12-14, above. Bott has the most numerous interests, nine (or possibly ten, *see supra* note 6), but none in-state. RRI has three, of which one is in-state. And, Ferguson, five, including four in-state. Of all the mass media interests listed above, the Twin Falls stations attributed to Ferguson for our comparative purposes are closest in proximity to Blackfoot (94 miles). RRI's daytime-only AM station at Eagle, Idaho is almost as close (130 miles); another RRI station is in Orcutt, California (800 miles). Ferguson's Ontario stations are third nearest (233 miles); her Baker, Oregon station is fourth nearest. Bott's closest station, at Central Valley, California, is fifth nearest (514 miles) to Blackfoot.

21. After weighing the applicants' respective attributable mass media ownership interests, we award RRI a slight diversification preference over Bott. *See Mark L. Wodlinger*, 101 FCC 2d 762, 767-771 (Rev. Bd. 1985) (slight diversification preference awarded to applicant with three attributable radio stations, including one in-state (100 miles from proposed community of license), in comparison to competing applicant with ownership interests in nine out-of-state radio stations remote from the proposed community); *cf. Ottumwa Broadcasting Co.*, 92 FCC 2d 1011 (Rev. Bd. 1982) (no diversification preference awarded in comparison between a radio station applicant whose 90% owners controlled another radio station 100 miles away with a competing applicant whose 51% owners controlled 100% of an AM/FM combination 200 miles away and 45% of a permittee for a station 400 miles away). In reaching this result, we have considered in RRI's favor that Bott has three times as many attributable media properties as RRI, although four of Bott's properties (and one of RRI's) represent significantly less than complete ownership. *See Policy Statement*, 1 FCC Rcd at 394-395. On the other hand, RRI's single in-state interest is significant because it is closer to the proposed community of license, *see id.* at 395. On balance, RRI is entitled to only a slight diversification edge over Bott. Bott, in turn, receives a slight-to-moderate diversification preference over Ferguson, because Ferguson has four attributable media properties which are in-state, and much closer to Blackfoot than any of Bott's stations, the closest of which is 514 miles away. *See Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 723-725 (Rev. Bd. 1983) (television applicant with interests in four distant, out-of-state television stations is "at most . . . entitled to a slight-to-moderate [diversification] preference over competing applicant with five broadcast interests, four in-state and one adjacent-state, and the closest of which is 132 miles from proposed community of license). While Bott has a greater number of media interests than Ferguson, this numerical difference essentially results from Bott's (20%) ownership shares in four stations quite remote from Blackfoot.

INTEGRATION OF OWNERSHIP AND MANAGEMENT

22. Under the "substantially important" comparative factor of ownership integration into management, *Policy Statement*, 1 FCC 2d at 395, there are no exceptions to the ALJ's award of 100% credit to Bott for his proposal to work fulltime as general manager of his proposed station, *I.D.*, paras. 5, 38, and no credit to RRI, which proposed no ownership integration, *id.*, para. 18. Therefore, this aspect of the *I.D.* is affirmed, *see* 47 CFR § 1.277(a) (any objection not raised in exceptions is waived). Thus, Bott receives a substantial integration preference over RRI. *See Multiplex Communications, Inc.*, 95 FCC 2d 406, 407 (Rev. Bd. 1983).

23. We must address, however, Ferguson's exception to the ALJ's award of only 50% integration credit to her, rather than a desired 100% credit, despite her pledge (as a sole proprietor) to serve fulltime as general manager of her proposed station. *I.D.*, paras. 22, 43-55. The ALJ found that Ferguson's husband, David Capps, would be, in essence, a 50% unintegrated owner of the proposed station, and therefore the ownership integration credit awarded Ferguson was reduced by half. The ALJ reached his 50% credit conclusion by (1) noting that Idaho is a community property state and inferring that Ferguson and Capps would each have an equal community property interest in the proposed station, and (2) deducing that Capps' 50% community property interest could not be attributed for ownership integration purposes back to Ferguson under the special mechanics of *Absolutely Great Radio, Inc.*, 104 FCC 2d 1, 4-6 (1986), *recon. denied*, 2

FCC Rcd 4603 (1987), because of Capps' active involvement with, and entanglement in, the instant Ferguson application. While we disagree with the ALJ's reliance on state community property law as an ingredient in Commission ownership integration analysis, we nevertheless affirm his conclusion that Ferguson may receive no more than 50% fulltime integration credit.

24. At the outset, *Absolutely Great* is neither directly apposite nor particularly helpful in the Ferguson "integration" setting. There, quantitative integration questions were related to a situation where *both* husband *and* wife -- by a joint tenancy agreement -- were equal equity owners of record, and that applicant sought a 100% integration credit, although only one spouse there would manage the station fulltime. Here, the situation is completely different: only *one* spouse claims equity ownership in the applicant, while the other claims no ownership interest whatever or intent to participate in station management. Nonetheless, the ALJ -- equating the Idaho community property law to the joint tenancy ownership in *Absolutely Great* -- *constructively* regarded both Ferguson spouses as 50% equity owners, thereby reducing Ferguson's fulltime integration factor to the 50% level of her perceived ownership. We do not accept the ALJ's analogy.[10]

25. "[T]he crux of [the Commission's] integration calculus is the coincidence of legal responsibility for and actual participation in . . . station" management. *Absolutely Great*, 104 FCC 2d at 5 (quoting *Ventura Broadcasting Co. v. FCC*, 765 F.2d 184, 190 (D.C. Cir. 1985)). In her application, Ferguson claimed to be the sole owner of the proposed station. While it may be that, under Idaho state law, assets (including those connected with the proposed station) acquired during the marriage are presumed to be community property, the Commission has consistently held that state law is not determinative in applying its integration policies, for it cannot effectively administer policies that vary from state to state, or that differ for community property and non-community property states. *See Mark L. Wodlinger*, 3 FCC Rcd 3139, 3140 (Rev. Bd. 1988). Obviously, almost all of the state laws brought to our attention in comparative cases were adopted for purposes having nothing to do with FCC policies, and these laws never contemplated the consequences in FCC broadcast licensing proceedings. These laws are generally inapposite to FCC policies and purposes, and not binding on our comparative analyses. In other words, a state law evaluation of whether or not Ferguson's proposed station would be community property is not conclusive in evaluating her FCC "integration" proposal. Indeed, were we to follow the rationale of the *I.D.*, the net result would be that *no* married principal residing in a community property state could *ever* achieve more than a 50% quantitative integration factor, even if that principal legitimately applied as a sole proprietor. No Commission precedent supports so sweeping a proposition, and we continue our well-trodden course of looking to FCC policy -- not to multivarious state laws enacted for unrelated purposes -- for guidance on comparative credit. For our purposes, it is the intent of the applicant, as manifested in its overt actions, that is determinative. *See KIST Corp.*, 102 FCC 2d 288 (1985), *aff'd by judgment sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986) (Table), *cert. denied*, 481 U.S. 1050 (1987); *Jarad Broadcasting Co.*, 1 FCC Rcd 181, 183-185 (Rev. Bd. 1986), *aff'd as modified on review*, 2 FCC Rcd 6080 (1987), *aff'd by judgment sub nom. Spectron Broadcasting Corp. v. FCC*, 858 F.2d 774 (D.C. Cir. 1988) (Table), *cert denied*, 109 S. Ct. 1140 (1989); *Signal Ministries, Inc.*, 104 FCC 2d 1481, 1493-1497 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1259 (1987), *aff'd by judgment sub nom. Adelphi Broadcasting Corp. v. FCC*, 838 F.2d 571 (D.C. Cir. 1988) (Table).

26. We now review the conduct of Ferguson and her husband to discern the likelihood of her alleged unitary management of the proposed Blackfoot station. As traced in considerable detail by the ALJ, Ferguson and Capps have acted as if they had a mutual ownership stake in the application. Here, the *I.D.* relates (at para. 55):

> Capps' action[s] with respect to the Blackfoot application belie any claim that he has been or will be "an owner in name only." Capps originally informed Ferguson about the Blackfoot allocation. Prior to filing her application, Ferguson visited Blackfoot, possibly with her husband. Ferguson retained legal counsel and an engineer, both of whom were already retained by her husband with respect to his stations. Both her legal counsel and engineer were paid out of a joint account (*i.e.*, with Ferguson and Capps both having legal control over the account), with checks being drawn by the office manager at stations KEZJ-AM/FM. From the time the first payments were made to her counsel and engineer, the money of both Ferguson and Capps was spent in the prosecution of her application. Capps made the appointment and initially visited their banker alone, when Ferguson and Capps were determining whether to finance the Baker, Oregon and/or Blackfoot, Idaho applications. They decided to use their jointly held personal assets (*i.e.*, cash) to prosecute the Blackfoot application and construct the station, and Ferguson certified her financial qualifications based upon their joint assets. It was Capps who initially contacted the Bureau of Land Management in order to find a transmitter site for Ferguson. When Ferguson visited her attorney, Capps accompanied her and participated in discussions regarding the preparation of Ferguson's Blackfoot application. Capps has also participated in selecting personnel for Ferguson's proposed Baker station. The Baker station is being built by another engineer, John Kelly Carlson, under the supervision of Ferguson and Capps. Mr. Carlson, who is presently the engineer at stations KEZJ-AM/FM, is also paid out of the Ferguson/Capps joint account.

While the use of joint funds for prosecuting the application and constructing the proposed station is not by itself determinative, *see, e.g., Jerome Thomas Lamprecht*, 99 FCC 2d 1219, 1224 (Rev. Bd. 1984) (by implication), *review denied*, 3 FCC Rcd 2527 (1988), the overall actions of Ferguson and Capps support the ALJ's conclusion that they have functioned, and will likely function, as a marital unit in the operation of their broadcast stations. Certainly, Capps has gone beyond the *Absolutely Great* standards of an inactive spouse, where "the inactive spouse cannot participate in the preparation of the application, cannot be proposed to participate in any station activities and cannot assist in funding of the proposed station as a contributor, lender or loan guarantor." 104 FCC 2d at 6.[11] Phrased in other terms, although a specific real-party-in-interest issue was never raised in this pro-

ceeding, *see* Tr. of Oral Arg. at 211-214, 233, and we do not doubt that Ferguson will help manage or suggest she is a "sham," we could not in the face of the record evidence demonstrating Capps' substantial entanglement in Ferguson's application award her 100% "integration" credit without first remanding this case on that issue. In any event, in view of Capps' substantial active involvement in the application, along with his considerable financial support (beyond the mere community property interest), we affirm the ALJ's conclusion (*I.D.*, para. 55) that:

> Capps will be considered a 50% unintegrated owner of Ferguson's Blackfoot station, and Ferguson will receive 50% full-time quantitative integration credit for her proposal to work at the station as its General Manager.

See KIST, supra: Jarad, supra; Signal Ministries, supra. Her quantitative "integration" credit was properly held to be no more than 50%.

CONCLUSION

27. Bott's substantial ownership integration preference (100% v. 0.0%) outweighs RRI's combined slight diversification preference and its ALJ-awarded slight-to-moderate comparative coverage preference, as well as RRI's minor auxiliary power preference. Cf. *Cleveland Television Corp.*, 91 FCC 2d 1129, 1143 (Rev. Bd. 1982) (substantial "integration" preference outweighs slight diversification preference), *review denied*, FCC 83-235, released May 18, 1983, *aff'd*, 732 F.2d 962 (D.C. Cir. 1984); *Old Time Religion Hour, 95* FCC 2d at 729 (substantial "integration" preference "far outweighs" slight-to-moderate diversification preference); *Omaha TV 15, Inc.*, 102 FCC2d 875, 885 (Rev. Bd. 1985) (same), *aff'd as modified*, 4 FCC Rcd 730 (1988); *Independent Masters, Ltd.*, 104 FCC 2d 178, 193-194 n.38 (Rev. Bd. 1986) (substantial "integration" preference outweighs slight-to-moderate comparative coverage preference).[12] Bott is also comparatively superior to Ferguson, because Bott not only outranks Ferguson in ownership integration (100% v. 50%), but it has also been awarded a slight-to-moderate diversification preference over Ferguson. Thus, even if we ceded, *arguendo*, a 100% "integration" credit to Ferguson, it would lose to Bott on media diversification. Therefore, we agree with the ALJ that a grant of Bott's application will best serve the public interest, convenience, and necessity.

28. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed on February 14, 1989 by Clare Marie Ferguson, filed on February 17, 1989 by Radio Representatives, Inc., and filed on December 12, 1988 and on April 3, 1989 by Richard P. Bott, II ARE GRANTED, and the amendments ARE ACCEPTED; and

29. IT IS FURTHER ORDERED, That the application of Radio Representatives, Inc. (File No. BPH-850711MO) and Clare Marie Ferguson (File No. BPH-850712MS) ARE DENIED, and the application of Richard P. Bott, II (File No. BPH-850711MM) for a construction permit for a new FM broadcast station at Blackfoot, Idaho IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Bott Petition for Leave to Amend, filed August 26, 1987, Att. B at 1-2 & Exh. I.

[2] *Id.*, at Exh. II, Att. 1 at 1-2; RRI Motion to Enlarge Issues, filed August 10, 1987, Att. 6 at 1.

[3] RRI Opposition, filed September 15, 1987, Att. 5 at 1.

[4] *Id.*, Att. 2 at 1 & Att. 3.

[5] A granted construction permit is an attributable media interest. *e.g., Payne Communications, Inc.*, 1 FCC Rcd 1052, 1061 (Rev. Bd. 1986); *cf. Land O'Lakes Broadcasting Corp. (WTRJ(AM))*, 4 FCC Rcd 344 (1989) (construction permit is regarded as extant station in Section 307(b) analysis).

[6] The licensee of Station KCCV(AM), Independence, Missouri also has a construction permit for Station KBCB(AM), Overland Park, Kansas. However, the construction permit restricts KBCB(AM) from commencing program tests until after the licensee divests KCCV(AM). *See*, Bott Br. at 7 n. 3.

[7] We do not herein base the attribution of Capps' media interests to Ferguson because of the community property laws of the State of Idaho, *see generally I.D.*, paras. 49, 52, but rely solely on FCC policies concerning the respective media interests of husbands and wives. We will address directly the ALJ's consideration of state community property laws in our discussion of ownership/management "integration" credit, *infra* para. 25.

[8] In a spurious offshoot of the spousal attribution root, the Board -- following so far as possible the Commission's *Ownership Attribution* standards -- has tentatively permitted one spouse to insulate its ownership interest from the other through use of a "limited" partnership arrangement. *Chester Associates*, 62 RR 2d 1315 (Rev. Bd. 1987) (application for Commission review pending). However, *Chester Associates* is off-point here because (1) the opposing applicant there conceded the validity of the "limited" partnership agreement as insulating the "passive" spouse; and (2) the issue there was the magnitude of ownership/management "integration" credit, not a media "diversification" issue. As suggested *infra* in our text, the *Chester Associates* spouses could not have overcome the ordinary spousal attribution doctrine that applies to media diversification, *had there been* a media diversification question in that case.

[9] To the degree analogous, these standards track those set forth in *Absolutely Great Radio, Inc.*, 104 FCC 2d 1, 6 (1986), again an ownership/management "integration" case, for forefending the attribution of a media ownership interest. However, like *Chester Associates*, above, *Absolutely Great* does not directly involve the conventional doctrine of spousal attribution as reflected in *Klein/McKinney-Smith*, the doctrine at issue in the case at hand.

[10] Were we to accept at full strength the ALJ's thesis that, in community property states, both spouses are 50% equity owners (by operation of law), we assume that both would be required to be listed in FCC ownership records as equal owners. The Commission's ownership reporting requirements contain no such suggestion. *See* 47 CFR § 73.3615. As the Commission's ownership rules do not *constructively* attribute media ownership to spouses based solely on community property laws, and for the

other reasons discussed in text, neither shall we for ownership/management integration analyses. However, as explained *supra*, paras. 15-17, the Commission's spousal attribution doctrine *does* require that -- for media *diversification* purposes -- we constructively attribute one spouse's media interests to the other. This latter dynamic has been perceived as necessary and proper to enhance the FCC's foremost goal of mass media diversification. *See Policy Statement*, 1 FCC 2d at 394; *Klein*, *supra*. No need for such a constructive fiction has been attached to the assessment of ownership/management integration credit; in that regard, each spousal equity interest is generally treated individually, save in the unique case of joint tenancies, *see Absolutely Great, supra*, or where it appears from the evidence that one spouse will not have complete control. *See N.E.O. Broadcasting Co.*, 103 FCC 2d 1031 (Rev. Bd. 1986), *review denied*, 1 FCC Rcd 380 (1986).

[11] We have said that *Absolutely Great*, to the extent that it relates *specifically* to joint tenancy interests held by both spouses, is inapposite to Ferguson and Capps in this situation. However, as also indicated at note 9 (and para. 16, *supra*), the standards set forth in *Absolutely Great* for discerning spousal non-involvement are a useful benchmark in the instant setting as well.

[12] We therefore need not reach Bott's "contingent" exception to the ALJ's award of a slight-to-moderate comparative coverage preference to RRI.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-568

In the Matter of

AT&T COMMUNICATIONS
Revisions to Tariff F.C.C. No. 12

MEMORANDUM OPINION AND ORDER

Adopted: April 12, 1989; Released: April 18, 1989

By the Commission: Commissioner Quello issuing a statement; Commissioner Dennis concurring and issuing a statement.

I. EXECUTIVE SUMMARY

1. In this Order, we address the core question raised by the proposed tariff revisions made by American Telephone and Telegraph Company (AT&T) to its Tariff F.C.C. No. 12, namely, whether such offerings are unreasonably discriminatory under Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). Based on our review of the record established in this docket, we conclude that AT&T's Tariff 12 offerings are not "like," as that term is used in § 202(a), the various component services AT&T otherwise provides under tariff. We also conclude, however, that AT&T's Tariff 12 offerings must be generally available to similarly situated customers. Because certain restrictions in AT&T's current Tariff 12 offerings unreasonably limit the availability of the packages, we find the tariff revisions under investigation in this docket to be unlawful.

2. To avoid the complete cessation of current services under Tariff 12, and concomitant disruption to existing Tariff 12 customers, we will permit the existing tariffs to remain in effect for present Tariff 12 customers for a short period of time pending AT&T's revision of the tariff to eliminate unlawful restrictions on availability. We direct AT&T to file such a revised tariff within 30 days of release of this Order and we provide guidance regarding the permissible content of the new tariff.

II. BACKGROUND

3. This proceeding was established to investigate specific issues raised by two AT&T "custom network" offerings and more general issues raised by AT&T's Tariff 12, which includes both offerings. The first offering was originally proposed in Transmittal No. 895 as the General Electric Telecommunications Network Service (GETN). AT&T stated that it developed the integrated voice and data service in response to a request for proposal (RFP) issued by GE in October 1986, and signed a five-year agreement with GE in March 1987, with service scheduled to begin within one year. AT&T originally requested a rule waiver to cross-reference the contract in Tariff 12 and limit the offering to GE. However, following objections by petitioners and questions raised by the staff of the Common Carrier Bureau, AT&T revised the offering to withdraw the cross-reference and present the service as a general offering to any customer on the same terms and conditions. The service was renamed Digital Tandem Switched Network Services (DTSN).

4. DTSN offered, as had GETN, a combination of various tariffed AT&T services, including Software Defined Network (SDN), Megacom, and private line, combined with certain switching, testing, and administrative functions "needed to perform the specifications required by the customer." AT&T D&J at 2. This set of functions was designated as the Digital Tandem Switching Arrangement (DTSA) and permitted the "entrance service" traffic to be switched between designated AT&T central office "nodes" linked by high-capacity Accunet T1.5 service. The network's integrated voice and data traffic could also be switched to "off-network" services such as WATS or foreign exchange (FX) lines. AT&T stated that the customer would purchase all transmission services from AT&T at the same rates, terms, and conditions available to all other customers pursuant to AT&T's tariffs for those services.

5. Over objections by three petitioners, the tariff took effect, but the Bureau recognized that the offering presented issues warranting further investigation.[1] The Bureau elaborated upon its concerns and designated the issues to be investigated in a subsequent order.[2] The Bureau's primary concern was whether the offering was unreasonably discriminatory. The Bureau explained its concern in this way:

> Any service that is offered exclusively to a particular customer would appear to violate Section 202(a) [of the Communications Act], which prohibits unreasonable discrimination in the provision of like services . . . . Although AT&T presumably could design an offering to satisfy the known requirements of a particular customer or a limited number of customers without violating any statutory standard, AT&T may be obligated to make reasonable efforts to create an offering that is as generalized as possible. We invite AT&T to describe its view of its statutory obligations in [its] direct case and to describe the efforts it has made to create a generalized offering.[3]

6. The Bureau subsequently expanded this investigation to include issues raised by AT&T's "Virtual Telecommunications Network Service" (VTNS) filed in Tariff 12.[4] Under VTNS, a customer commits to taking a certain volume of voice and data service from AT&T over a fixed period of time. In return, AT&T agrees to provide those services at a specified rate using whatever mix of equipment and facilities AT&T considers on an ongoing basis to be most efficient and economical. As described by AT&T, VTNS provides voice and data transmission capabilities "in a single service, unlike existing services that each provide a discrete type of voice or data communications capability."[5]

7. Thus, the advantages of VTNS from a customer's perspective, in addition to the rate, are (1) that it enables the customer to obtain voice and data services on a consolidated basis from one vendor and (2) that it provides

more long-term rate stability than is available under existing tariffs, thereby permitting long-term planning of service costs.

8. AT&T has filed four options for VTNS service, each of which implements a negotiated agreement with a particular customer for telecommunications service. VTNS I was developed by AT&T as a result of negotiations with the Dupont Company. It provides for an integrated voice and data network managed by AT&T consisting of 2070 ports in four specified LATAs. The rates for the service are stabilized for five years.

9. On February 29, 1988, AT&T filed Transmittal No. 1145, introducing VTNS II, developed in response to a request for quotation issued by the Ford Motor Company. The transmittal also created more general regulations for VTNS, and eliminated much of the cross-referencing between VTNS and other AT&T tariffs. VTNS II included two optional features not previously offered in conjunction with VTNS -- authorization codes, which work like calling cards, and port access telephone numbers, which allow calls to be billed to specific numbers within the network.[6]

10. AT&T filed Transmittal No. 1336, establishing VTNS III, on September 1, 1988. AT&T modified this filing in Transmittal No. 1349 by adding automatic number identification (ANI) as an additional option available under VTNS III. AT&T stated that VTNS III was provided at the request of a specific customer and was tailored to meet its individual needs. The primary differences between VTNS III and earlier VTNS offerings and DTSN include different rate periods, specialized at the request of the customer, volume discount pricing plans under certain schedules for preselected points on the network, 1.544 Mbps data transmission service, network prompters, and ANI.[7]

11. Transmittal No. 1409, filed November 16, 1988, introduced VTNS IV. AT&T stated that VTNS IV was offered pursuant to a specific customer's request. AT&T alleged that the customer was considering alternative offerings of other service providers, and requested and received assurance that there would be no restrictions on resale. AT&T VTNS IV Description and Justification (D&J) at 1-2. The general regulations for the first three options under VTNS apply to VTNS IV and minor changes to the general regulations are proposed to reflect the method of billing calls made to port access telephone numbers.[8]

III. SUMMARY OF PLEADINGS[9]

12. Generally, AT&T argues that its Tariff 12 offerings are lawful, and that it may provide customized tariff services pursuant to the Communications Act. AT&T further argues that customized offerings which package its network services to meet the needs of its most sophisticated customers are encouraged by the Communications Act and prior Commission decisions.[10] In support of its assertions, AT&T cites language from a number of notices of proposed Rule Making issued by this Commission,[11] and the general language of Section 201(a) of the Act, 47 U.S.C. § 201(a), requiring common carriers to furnish telecommunications service upon reasonable request.[12]

13. Some commenters, consisting primarily of potential or actual integrated package service customers, support AT&T's assertion that it may lawfully provide custom designed service packages to particular customers under § 202(a) of the Communications Act,[13] while others, consisting primarily of AT&T's competitors, argue that such individualized tariffs violate this section of the Act.[14]

A. "Like" Services

14. The pleadings filed thus far in this docket address, *inter alia*, the issues designated for investigation in this docket pursuant to our earlier orders.[15] In this Order, we address only those issues concerning the lawfulness of Tariff 12 under § 202(a) of the Act. Accordingly, in the paragraphs below, we summarize only the pleadings addressing those issues.

15. The commenters argue that a central issue in our determination of the lawfulness of Tariff 12 is whether Tariff 12 is "like" existing services offered by AT&T for purposes of determining whether Tariff 12 complies with § 202(a). AT&T asserts that Tariff 12 represents a customized configuration of voice and data capabilities not available under any single AT&T tariff. AT&T explains that "[c]ustomized tariff services represent individualized configurations of services whose functions and costs are not the same or comparable to a simple summation of 'piece parts' from a 'menu' of off-the-shelf services. Both the usefulness and the cost of providing customized services depend on the nature of the configurations themselves."[16] AT&T asserts that the provision of integrated service is perceived by customers as different from AT&T's stand-alone tariffs, noting that "[c]ustomers have overwhelmingly confirmed that from their perspective, custom services, such as VTNS, are not the functional equivalent of existing tariffed services."[17] AT&T further observes that many customers have requested that carriers have the flexibility to respond to customers' needs through the offering of customized services.[18]

16. Several commenters support AT&T's position that the integrated network provided by AT&T cannot be reconciled with the individual tariffs of AT&T.[19] For example, GSA states that "custom-designed integrated networks are not and should not be considered reconcilable with the individual tariff elements that superficially appear to correspond to the piece parts of these networks."[20] Further, these commenters maintain that the requirements of certain customers cannot be satisfied with a carrier's individual tariffed offerings and that integrated service networks offer more than the stand-alone tariffs. Supporting this position, GSA further observes that a "network is a product in which the total is greater than the sum of the parts. The highly complex communications requirements of large business and government entities involve elaborate system configurations, requiring a sophisticated understanding of service requirements, performance standards and facilities capabilities."[21]

17. These commenters argue that Tariff 12 offers a "turn-key" service which is different from the purchasing of the individual service "parts" out of AT&T's tariffs.[22] The Ad Hoc Telecommunications Users Committee, for instance, argues that customers can be divided into two categories -- those who prefer a "piece-out" strategy, and those seeking a "turn-key" approach. Ad Hoc characterizes this second group of customers as seeking a "complete customized integrated service package . . . " with the decision to take such a service "based primarily on considerations of performance and functionality . . . [which] depends on the extent to which users wish to devote human resources to managing their telecommunications needs on a day-to-day basis, the degree to which they can

justify major capital outlays in building a telecommunications system, and the degree of stability or instability in the customer's own business market."[23] These commenters maintain that, as consumers of integrated service packages, they perceive a real difference between the service provided by integrated service packages and the taking of communications service from a variety of separate tariffs.[24]

18. In addition, MCI does not appear to dispute that there is a market for custom tariffed services in which AT&T may participate, stating that AT&T's pleadings appear "to include MCI among those contending that AT&T is foreclosed from offering custom tariffed services -- a characterization that does not accurately reflect MCI's position on that question."[25] MCI continues that it is their position "that AT&T may engage in such business undertakings to the extent that . . . those services are offered pursuant to tariffs that are just, reasonable and not impermissibly discriminatory."[26]

19. AT&T concedes that Tariff 12 uses the same transmission facilities as other AT&T services, and that similar engineering, network management, and administrative activities are performed by AT&T for Tariff 12 and all other services of AT&T.[27] AT&T asserts, however, that Tariff 12 allows AT&T to determine on an ongoing basis the mix of shared and dedicated facilities over which service is provided. According to AT&T, this provisioning flexibility, together with the customer commitment to traffic volumes and time commitments under Tariff 12 offerings, distinguish Tariff 12 services from other AT&T offerings. AT&T states that such time and volume commitments allow AT&T to make greater use of existing facilities, in the design of the network and in the planned growth of the network. This optimized use of facilities allows AT&T, they claim, to pass the resulting cost savings through to the particular customers.[28] According to AT&T, the provision of an integrated network service allows AT&T to provide some services more efficiently than would otherwise be possible if it were providing services separately.[29]

20. A number of other commenters dispute AT&T's assertions that Tariff 12 is not "like" the other services of AT&T, and argue that Tariff 12 is simply a pricing mechanism providing discounts only to specific customers. These commenters contend that AT&T provides no information that unique facilities or functionalities are used or provided in Tariff 12. These commenters assert that none of the services offered require unique or new operations from the network, and that the joint provision of voice and data over the same network can be achieved through the use of CPE with any of AT&T's services. They argue that there is no difference between the functions provided under Tariff 12 and the functions that are provided through the bundling of services under AT&T's Tariffs 1, 9 and 11.[30] These commenters conclude that Tariff 12 is merely the result of the administrative bundling of functionalities that are equivalent to the functionalities of other AT&T services.[31]

B. Unreasonable Rate Discrimination

21. AT&T notes that the Communications Act prohibits only unreasonable discrimination between "like" services. Since Tariff 12 services are not "like" any other AT&T services, AT&T concludes that custom services are not unreasonable as long as they cover their appropriate costs.[32] The commenters argue, however, that not only is there a significant disparity between the rates charged for Tariff 12 offerings and other AT&T services, but the rate disparity is not justified by any statutory purpose, cost differentials, or competitive necessity. The commenters claim that the fact that Tariff 12 bundles other service offerings of AT&T to offer a novel pricing structure, and is not generally available, indicates that Tariff 12 constitutes unreasonable discrimination in favor of Tariff 12 customers. Therefore, commenters conclude, Tariff 12 offerings are unreasonably discriminatory and unlawful under § 202(a) of the Act.[33]

IV. DISCUSSION

22. While the arguments raised on either side by the pleadings range widely into technical issues, our analysis of the issues presented by these offerings properly begins with the legal framework established by the Communications Act and the mechanisms for implementing that framework already established by this Commission in analogous cases.

23. In the following discussion, we review the applicable statutory provisions and the judicial and Commission precedent interpreting those provisions. Applying the relevant legal standard to integrated service packages, we conclude that integrated service packages such as AT&T's Tariff 12 offerings are not "like" the various component services of such packages which are tariffed on a disaggregated basis. We also conclude, however, that one customer's integrated service package can be "like" another for purposes of applying the prohibition of § 202(a) of the Act against unreasonable discrimination among "like" services. Therefore, integrated service packages such as AT&T's must be generally available to similarly situated customers who seek "like" packages.

24. Because certain restrictions in AT&T's current Tariff 12 offerings unreasonably limit the availability of the packages, we find AT&T's Tariff 12 offerings unlawful. To avoid a sudden cessation of current services under Tariff 12, and concomitant disruption to existing Tariff 12 customers, we will permit the existing tariffs to remain in effect for present Tariff 12 customers pending AT&T's expeditious submission of a revised tariff which eliminates all unlawful restrictions.[34] AT&T may also, of course, choose to withdraw the service. We direct AT&T to file such a revised tariff or withdraw the tariff before us no later than 30 days after release of this Order and we provide guidance regarding the permissible content of any revised tariff.[35]

25. We emphasize that the analysis which follows applies to integrated service packages such as those established in AT&T's Tariff 12. By using the term "integrated service packages," however, we mean to refer to those offerings similar to AT&T's whose defining characteristics are set forth in paragraph 45, *infra*. Carriers might, of course, seek in the future to offer, or file a tariff for, service denominated an "integrated package service" which differs so fundamentally from the service proposed in AT&T's Tariff 12 and envisioned in this Order that our analysis herein would be inapplicable. We will address whether a particular offering warrants such a characterization when we are presented with a claim to that effect.

26. AT&T seeks to justify its Tariff 12 offerings under § 201 of the Act, which requires every common carrier "to furnish . . . service upon reasonable request therefor." As US Sprint rightly points out, however, the provision of service is not the issue which AT&T's Tariff 12 offerings

raise. AT&T is clearly free to provide all of the services and facilities included in these packages, and in general to provide the services best adapted to customers' needs. But in doing so, AT&T, and for that matter, any common carrier subject to the Act,[36] must also comply with § 202(a) of the Act.

27. The general nature of this Commission's analysis under § 202(a) is well established. Section 202(a) prohibits unjust or unreasonable discrimination in the provision of like services. Specifically, § 202(a) provides as follows:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

28. To enforce § 202(a), the Commission engages in a two-step analysis. As a first step, this Commission must determine whether the services involved are "like."[37] If they are, we must then consider whether any discrimination among them is unjust or unreasonable.

29. The issue presented by Tariff 12 offerings is whether, by providing a combination of tariffed services at a package rate, AT&T is creating a new service unlike its component parts or is instead providing existing services in a package no different from that obtained by customers who order individual services under AT&T's existing tariffs. If the former is the case, no discrimination issue arises vis-a-vis the tariffs for component services, although AT&T must demonstrate that Tariff 12 otherwise complies with the Act and our rules. If the latter is the case, AT&T must also demonstrate (by, *e.g.*, demonstrating a cost basis for any rate differences) that Tariff 12 does not unjustly or unreasonably discriminate against customers who take the same services under existing tariffs. In either case, AT&T must demonstrate that Tariff 12 does not discriminate unreasonably against customers who take the different packages represented by the various Tariff 12 options.

30. In section A.1. below, we first review the legal standard for determining whether services are "like." Next, in section A.2., we apply the "like" services standard to integrated service packages to determine whether such services are "like" the individually tariffed component services or "like" each other. We conclude that integrated service offerings are not "like" separately tariffed components. We also conclude, however, that integrated service offerings can be "like" each other, requiring carriers to provide such integrated services without discriminating unreasonably among customers for them.

31. In section B below, we apply our legal analysis of integrated service packages to AT&T's Tariff 12 offerings and conclude that the current tariff provisions are unlawful because they deny service to similarly situated customers seeking "like" packages. We therefore direct AT&T no later than 30 days from release of this Order either to withdraw the service or to file revised tariffs for generally available integrated service packages, although we permit existing customers to continue service under the present tariffs in the interim.

32. Finally, in section C below, we describe the procedures we expect to employ and the data upon which we will rely when we evaluate the reasonableness of specific package services in both our review of the tariffs for such services pursuant to § 204, including AT&T's new Tariff 12 to be filed in accordance with this Order, and our resolution of complaints pursuant to § 208 regarding provision of such services.

A. " *Like* " *Services and Integrated Packages*

1. Legal Standard for "Likeness" Under § 202(a)

33. The question of whether services are "like" is to be decided on a case-by-case basis.[38] This Commission has developed, and the D.C. Circuit has approved, a standard means of determining likeness – the "functional equivalency" test. The court in *American Broadcasting Companies, Inc. v. FCC* [39] stated that "[u]nder this test as developed by the Commission, the inquiry centers on whether the services are 'different in any material functional respect.'"[40] Courts have consistently recognized that this "functional equivalency" test is an appropriate method for determining likeness within the meaning of § 202(a).[41]

34. The D.C. Circuit has stated that the functional equivalency test requires this Commission to examine both the nature of the services and the perception of the customer as to whether the services are different. In *ABC*, the court stated that "the test looks to the nature of the services offered to determine likeness; the perspective of the customer faced with differing services is often considered a significant factor."[42] In the subsequent *Ad Hoc* case, the court emphasized the importance of customer perception, and called it the "linchpin" of the functional equivalency test.[43] The court in *Ad Hoc* also recognized that the functional equivalency test, which was developed by this Commission, is still evolving, and that this Commission has a certain amount of discretion in the application of the test.[44] The court stated that it would leave "to the Commission, in the first instance, the task of identifying the proper method of applying this critical concept, customer perception of functional equivalency."[45]

35. The functional equivalency test is, therefore, by its nature quite fact specific, focusing as it does on comparisons between the various functionalities of the services at issue, and on customer perceptions of those functionalities.

36. In an early "like" services case, the 1966 *American Trucking* case,[46] the D.C. Circuit upheld the Commission's finding that AT&T's TELPAK service and its private line service were "like" services. In that case, the court found it significant that AT&T had told the Commission that TELPAK was a form of private line service and noted that AT&T gave many private line customers new rates under the TELPAK tariff, without any change in the facilities used or services received.

37. In the 1977 *Western Union* case,[47] the Second Circuit affirmed a Commission decision that facilities used by the international record carriers for interconnection with AT&T facilities were essentially identical to those used by the specialized domestic carriers. The court noted that the facilities for both services were voice grade circuits and

performed essentially the same functions.[48] The court stated that the Commission's finding of "likeness" with regard to the domestic and IRC services was supported by substantial evidence.[49]

38. The 1980 *ABC* case concerned full and part time rates for directional channel service used by television broadcasters. The Commission had held that full-time service and part-time service are "like," and the D.C. Circuit affirmed that decision.

39. In the 1982 *Ad Hoc* case mentioned above, the D.C. Circuit provided this Commission with considerable guidance on our application of the functional equivalency test. In that case, the court remanded a decision in which this Commission had found that WATS was "like" MTS. We had previously determined that Inward WATS and Outward WATS were not "like" services in the context of a § 201(b) just and reasonable rate determination. The court noted that prior determination and questioned our treatment of WATS as a unitary service in the case under review. The court concluded that the Commission should have compared Inward WATS and Outward WATS separately to MTS, and that it should have evaluated the perceptions of customers of each of the three services.

40. Both the majority and the concurring opinion in *Ad Hoc* attempted to offer some guidance for this Commission's future applications of the functional equivalency test. The majority confirmed that the functional equivalency test, with customer perception as a linchpin, is an appropriate standard for determining § 202(a) "likeness."[50] The majority also offered some procedural guidance,[51] and concluded that previous cases, which upheld Commission determinations that various services were "like," are therefore of limited utility in determining which factor or combination of factors would justify a contrary conclusion. "Nor do these cases indicate the degree of functional variance the Commission or courts will countenance and yet pronounce the two services 'like'."[52] The majority also questioned this Commission's conclusion that, despite the different service features and operational characteristics of WATS and MTS and our previous conclusion that Inward WATS and Outward WATS are not "like," MTS and WATS are functionally equivalent, especially in light of customer perceptions of differences between the two services.[53]

41. In his concurring opinion, Judge MacKinnon offered a more detailed analysis of the types of factors this Commission ought to consider in its application of the functional equivalency test. The concurrence argued that this Commission must not stop its analysis after a finding that similar facilities are used for both services, but must focus on the "essential differences in the character and extent of the services rendered and the perception of those services as viewed by the subscribers and users."[54] The concurrence continued:

> The entire service package a customer purchases from a carrier should serve as the basis for making a likeness determination. Each component right, benefit, restriction, characteristic, or service provided by the carrier is relevant to the determination. Concededly, among the factors to be considered, transmission technology is the dominant one. But other factors to be properly considered *might properly include* operational characteristics, use restrictions, geographic limitations, service features, facilities, and customer perceptions of the various services.[55]

42. In sum, the relevant cases require this Commission, when evaluating whether services are "like," to consider first the nature of the services provided and whether the services provide the customer with equivalent network functionalities. While this analysis is highly fact-specific and our "like" services determination must be made on a case-by-case basis, the courts have identified as relevant for our consideration such factors as differences in physical facilities and transmission technologies, operational restrictions, service characteristics and features, use restrictions, geographic limitations on service, and benefits.

43. Second, when we evaluate functional differences between services, the courts have directed us to give substantial weight to customer perception, describing customer perception as the "linchpin" of the functional equivalency test. As the *Ad Hoc* court emphasized, the focus of the test "should be practical, oriented to customers: what function or need do customers perceive to be satisfied by the services under examination?"[56] Finally, the courts have emphasized that such differences as we may identify must be "material" before we can rely on them to distinguish unlike services.

2. Application of Legal Standard for "Likeness" to Integrated Service Offerings

44. (*a) Integrated Service Packages and Tariffed Components* --We first consider whether integrated service offerings are "like" the individually tariffed service components of such packages. We conclude that they are not.

45. By "integrated service packages," we mean those offerings such as AT&T's Tariff 12 which integrate a number of separately available transmission services. Such offerings are currently available not only from AT&T but from other interexchange carriers as well. Integrated service packages provide a number of functionalities unavailable if the package is disaggregated and its components provided under separate tariffs. For example, customers who order such a package pay a basic price for each unit of service. That price will not change if the carrier must vary the particular proportion of separately tariffed component services used to deliver service to the customer. Nor does the integrated service package require the carrier to provide service over dedicated facilities or particular facility types. Indeed, the carrier can change the facility and service mix used to deliver an integrated package service completely unbeknownst to the customer. This increased flexibility in the provisioning of the integrated package service is not available if the customer orders a variety of services individually from the carrier's disaggregated tariffs. For such services, the tariffs typically specify facility types and the customer must specify quantities for each service, re-ordering when it wishes to change the relative quantities needed. Thus, integrated service packages include as service functionalities much of the periodic monitoring of demand and tracking of network traffic load, as well as the adjustment of service mix in response to changes in traffic patterns, which the customer would otherwise perform.

46. Service integration enables a carrier to offer other functionalities as well. In AT&T's Tariff 12 offering, for example, integrated on-line access to AT&T test systems and integrated system of alarms allows AT&T to issue reports and to isolate network trouble automatically with

no need for manual testing or further delays. The source of the trouble can then be immediately referred to the proper AT&T office for correction.[57] The integrated provision of service also provides cost saving efficiencies through the elimination of administrative and engineering functions which would be required in the provision of individual services, such as pre-service review of orders for service impact.[58] Moreover, the provisioning flexibility achievable through integrated service offerings which is not available in the provision of stand alone services allows the carrier to eliminate otherwise duplicative functions, and to more efficiently guarantee service quality through alternate routing.

47. We are mindful of the courts' admonition that we give appropriate weight to customer perception in making determinations of "likeness." Applying that aspect of the "likeness" test to the services now before us, we conclude that, from the customer's perspective, integrated service packages offer two additional functionalities unavailable under the disaggregated tariffs. First, customers have indicated that integrated service offerings permit customers to identify their total service requirements to which the carrier responds with a single tariff which unifies all relevant technology requirements and applicable terms and conditions. Customers have characterized this as a "turnkey" approach[59] which enables them to better evaluate service alternatives from competing providers and to eliminate significant management and support costs associated with overseeing the coordination of services obtained from component tariffs.

48. The second feature which, from the customer's perspective, distinguishes integrated service offerings from tariffed components is the extent of mutual commitment between the customer and the carrier evidenced in the tariff. When a customer orders service pursuant to a tariff for an integrated service package, the customer commits to a minimum level of demand for a fixed period of time. In return, the carrier commits to a specific price and guarantees service availability during the relevant time frame. These limited cross-commitments permit considerable flexibility regarding traffic distribution and network technology and costs for both carrier and customer in the delivery of service.

49. By contrast, the tariffs for component services establish much more detailed mutual commitments between carrier and customer. For example, private line services and MTS can both be used to construct a message path between two locations. In a private line service, the customer is limited to communications between the specified points, must typically order services well in advance of actual use, and must pay monthly and nonrecurring charges independent of the actual use of the facility of communications. The carrier in turn commits to offer a continuously available communications facility between the two points. This is in contrast to MTS which is a much more flexible service, with respect to the points interconnected, method of payment, and advance notice required for use of the service. For MTS, the carrier is not committed to provide a channel between any two points on a continuous basis. Furthermore, the price per minute of use for the more flexible MTS service can be much higher than the effective price per minute of a highly utilized private line facility. In both cases, however, the customer is free to vary the quality of service it purchases within a relatively short time frame as its needs and the suitability of competitive alternatives change. The carrier is free, subject only to this Commission's regulation, to vary the price of these services over time.

50. These differences between service under integrated packages and service under disaggregated tariffs have particular relevance to the underlying economics of integrated service packages. Modern economic theory teaches that there are powerful reasons for differences in the cost of production for an otherwise similar commodity depending on the rate at which it is produced.[60] The cost of producing a commodity will be different depending upon the rate at which it is produced, its current cumulative production levels, and the total expected volume of output. It is often cheaper to produce a large quantity at a continuous rate, than to produce smaller lots at varying rates.

51. Modern economic analysis also teaches that the terms of contract are often of crucial importance to the organization of economic activity.[61] The stability of contract terms is even more important when the service purchased is combined with complementary inputs to produce the service that is really desired by the user. The terms and stability of the basic service affect the buyer through their effect on the productivity of the complementary products as well as through their direct effects. In telecommunications, this latter factor is apt to be quite significant since common carrier telecommunications services are used with data processing equipment to produce integrated information management services.

52. Integrated service packages combine these two economic characteristics. Package offerings, by combining a mutual commitment to a specified volume and level of service, offer both the possibility of cost reductions from providing the more stable set of outputs, as well as the additional value which the package offering may provide the customer.

53. Because of these functional differences between integrated service packages and tariffed component services, both from the perspective of the technologies involved and the customer ordering service, we conclude that integrated service packages are not "like" their tariffed component services.

54. (*b) Differences Among Integrated Service Packages* – We next consider whether integrated service packages are "like" each other for purposes of § 202(a). We conclude that they are and that carriers must therefore ensure that such packages are generally available to similarily situated customers who request substantially similar packages.

55. We base this conclusion upon the fact that the functionalities identified in the previous section which differentiate integrated service packages from disaggregated tariffs are common to all integrated packages. Indeed, they are intrinsic to integrated service packages. Thus, customers of such packages receive the same network functionalities available in other packages.[62]

56. Differences between packages may reflect differences in the terms and conditions under which customers take such packages, but not differences in the fundamental service functionalities available with such a package. For example, customers may vary in their minimum volume requirements, their ability to commit to a fixed time term, or the distribution of traffic concentrations associated with their network configuration. Variations in these aspects of service simply reflect the fact that every customer's service requirements vary according to the specific locations

served and may differ from those useful to another customer. Such differences account for differences among customers' bills or differences among packages in pricing and in availability to customers but do not generally justify characterization of the service obtained by customers as "unlike."[63] Regardless of the variation in these factors, the customer still receives the functionalities identified in the previous section which result from integrating a variety of service components into a single offering managed by the carrier.

B. Lawfulness of AT & T's Tariff 12 Offering

57. While we have reached a number of conclusions in the preceding section regarding the lawfulness of package rate structures, we conclude that the particular tariff provisions under investigation in this docket are unlawful. Our objection to the various Tariff 12 options currently before us is that the offerings are on their face effectively available to only one customer, namely, the customer whose individually negotiated contract with AT&T prompted the filing. Thus, AT&T has restricted the availability of the particular packages before us in a manner which unreasonably discriminates among similarly situated customers.

58. For example, the various Tariff 12 options currently contain geographic restrictions upon availability. The tariff provisions for VTNS Option I state that the option is only available in Local Access and Transport Area (LATA) numbers 536, 422, 560 and 228.[64] No limitation upon necessary facility or network capacity requires such a limitation nor does AT&T proffer any other persuasive justification for so limiting the service. Yet the clear effect of such a limitation is to prevent customers in other LATAs from taking service under Option I. Similarly, the tariff contains limitations regarding the particular hub locations at which AT&T will offer each of the Tariff 12 options. If geographic limitation is necessary due to technical restrictions imposed by certain local exchange company switching equipment or AT&T point-of-presence switch restrictions, the limitations must be stated in terms of these limitations.[65]

59. Accordingly, we find that AT&T's Tariff 12 unreasonably discriminates among customers for integrated service packages and is therefore unlawful. To avoid unnecessary disruption to existing Tariff 12 customers, we will permit AT&T to continue to provide service under the terms and conditions of Transmittal Nos. 895, 961, 1018, 1102, 1145, 1248, 1336, 1340, 1349, 1398, and 1409 pending refiling or withdrawal of the service.[66] We direct AT&T to withdraw Tariff 12 or refile revisions that comply with this Order no later than 30 days from release of this Order. We will review any proposed revisions on an expedited basis to minimize the time period during which we must permit AT&T to provide service pursuant to an unlawful tariff.

C. Guidelines for Evaluating Differences Among Package Tariffs

60. As we discuss in the paragraphs above, past decisions by this Commission and the courts interpreting the requirements of the Communications Act establish certain principles and policies which must guide our analysis of the legality of integrated service packages like those in AT&T's Tariff 12. The result of our determination that integrated service packages share fundamental definitional characteristics which make them "like" each other is that a carrier may not unreasonably discriminate in the offering of such packages. Instead, carriers must make such packages generally available to all similarly situated customers.

61. We have no doubt that carriers will continue to offer integrated service packages in response to indications of very real customer demand for such offerings. Thus, this Commission can expect to be called upon to evaluate whether carriers' packages comply with the statute primarily in two procedural settings -- in our review of tariff filings by AT&T as a dominant carrier and in the resolution of complaints against AT&T and non-dominant carriers offering such packages. Accordingly, we provide the following guidance regarding the requirements such packages must meet to pass muster under the Act.

62. First, consistent with the Act and our regulatory policies, we emphasize that our primary concern is the protection of customers for such services. Consequently, we will focus our review of integrated service offerings upon ensuring the availability of such packages to all similarly situated customers seeking substantially similar packages.

63. This focus is consistent with the court's determination in *Sea - Land Service, Inc.*, 738 F.2d 1311 (D.C. Cir. 1984) that rates set by contract between carrier and customer are not *per se* unlawful "provided that the carrier offering them makes them available to all similarly situated [customers]." [67] Although the specific issue before the *Sea - Land* court was whether contract rates are permissible under the Alaska Railroad Act of 1914, Ch. 37, 38 Stat. 305 (codified as amended at 43 U.S.C. §§ 975-975g (1982)), the core issue before the court was whether contract rates are " *per se* violations of the common carrier duty of non-discrimination."[68] As the court observed,

> contract rates can still be accommodated to the principle of nondiscrimination by requiring a carrier offering such rates to make them available to any shipper willing and able to meet the contract's terms. If those terms result in lower costs or respond to unique competitive conditions, then shippers who agree to enter into the contract are not similarly situated with other shippers who are unwilling or unable to do so.

Sea - Land Service, Inc. v. ICC, 738 F.2d at 1317.

64. Our task in the tariff review setting is to evaluate tariff revisions establishing integrated service offerings to ensure that the carrier does not impose arbitrary limits on the availability of the package to similarly situated customers. Therefore, integrated service tariffs should affirmatively state that they are generally available to customers with insubstantial differences in their ability to meet particular eligibility requirements. We will scrutinize closely any restrictive eligibility requirements to ensure that they are not pretexts for unreasonably discriminating among customers.[69] If there are indications that such statements are not *bona fide* -- for example, if the tariff contains terms such as geographic restrictions that are so specific that they could only apply to a single customer and are not readily subject to reasonable variation, or if in fact such packages are not being made available solely because of insubstantial differences in cus-

tomers' ability to meet eligibility requirements -- we would expect to reject or to suspend and investigate such tariffs.[70] Where there are no such indications, we do not anticipate, as a general matter, rejecting or suspending and investigating such tariffs for lack of general availability.

65. Once a carrier has an effective tariff for integrated package service, or, in the case of non-dominant carriers, provides such service to one or more customers, the carrier cannot deny service under its existing packages to similarly situated customers. Moreover, carriers offering integrated package service may not refuse to modify existing packages to serve additional customers simply because those customers' needs may differ in insubstantial ways from those underlying the carrier's existing packages. Carriers must respond to customer requests for reasonable modifications to existing packages by providing such service. Carriers need not, of course, respond to customer requests for unreasonable modifications.

66. Customers who are refused service under an existing package, or who are offered only an alternative package with modifications the customer considers unreasonable, may file a complaint pursuant to Section 208 of the Communications Act, 47 U.S.C. § 208. Our task in resolving a complaint is to ensure that no customer is denied service under a particular package or offered a substitute package when differences between the customer's requirements and the particular package service sought by the customer are insubstantial.[71] This Commission will very strictly enforce the rights of such *bona fide* customers.

67. In evaluating complaints regarding denial of service under an existing package, we will require customers to demonstrate that they substantially meet the general eligibility requirements for the integrated package service. In evaluating complaints regarding the reasonableness of any substitute or modified packages offered to the complaining customer, we must evaluate differences between the customer's request for service and the carrier's existing package service. If those differences are insubstantial, the carrier cannot reasonably require customers to take a different package. In performing this analysis, we will look to such factors as variations in minimum volume levels, time commitments, relative package prices (using tariffed rates for relevant component services as a guide), and the mix of services requested.

68. Thus, for example, if another customer sought and was denied a Tariff 12 offering and requested only a slightly different service, AT&T would have to make a convincing showing that the differences were substantial. In particular, we would scrutinize the packages very closely to insure that there is no unreasonable discrimination among customers on the basis of insubstantial differences. Of course, to the extent that carriers define their packages by more general eligibility requirements, *e.g.*, minimum volume requirements, extended time terms, or traffic concentration characteristics, we can anticipate receiving fewer complaints since fewer prospective customers will be excluded from eligibility.

69. We believe these guidelines provide carriers and customers with sufficient certainty regarding the acceptable characteristics of package offerings to ensure customer needs for such services will be met by carriers in a reasonable, non-discriminatory fashion. We will determine on a case-by-case basis whether particular packages comply with the statute and we expect that both our analysis and the carriers' proposals for offering this service may change as both are sharpened by experience in this marketplace.

V. CONCLUSION AND ORDERING CLAUSES

70. The Commission has reviewed the tariff transmittals, the direct cases, the supporting materials, and the pleadings filed in this docket and we conclude that the tariffs referenced herein violate Section 202(a) of the Communications Act and therefore must be found unlawful.

71. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 202(a), 204(a), and 205 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 202(a), 204(a), 205, that the investigation of American Telephone and Telegraph Company, Tariff F.C.C. No. 12, Transmittal Nos. 895, 961, 1018, 1102, 1145, 1248, 1336, 1340, 1349, 1398, and 1409, IS TERMINATED.

72. IT IS FURTHER ORDERED that the petitions opposing the American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 895, 961, 1018, 1102, 1145, 1248, 1336, 1340, 1349, 1398, and 1409, ARE GRANTED to the extent indicated herein, and the tariffs ARE UNLAWFUL.

73. IT IS FURTHER ORDERED that all other petitions related to American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 895, 961, 1018, 1102, 1145, 1248, 1336, 1340, 1349, 1398, and 1409, ARE DENIED to the extent not granted herein.

74. IT IS FURTHER ORDERED that American Telephone and Telegraph Company SHALL FILE, no later than May 18, 1989, EITHER tariff revisions to become effective on notice of not more than 1 day, in order to remove unlawful material from their tariffs; OR tariff revisions reflecting provisions in compliance with this Order, and a supplement indicating that the existing unlawful material will expire, to become effective on not less than 45 day's notice.

75. IT IS FURTHER ORDERED that for the above purpose Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58 and 61.59, are waived and Special Permission No. 89-294 is assigned.

76. IT IS FURTHER ORDERED that this Order IS EFFECTIVE on adoption.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

AT&T Tariff F.C.C. No. 12
Custom Designed Network Services
CC Docket No. 87-568

Index and Chronology of Filings

Digital Tandem Switched Network (DTSN) (General Electric)

AT&T Waiver Application No. 379	Filed	April 15, 1987
Transmittal No. 895	Filed	April 22, 1987
Comments and Petitions	Filed	May 7, 1987
American Petroleum Institute (API)		
General Electric Company (GE)		
Southwestern Bell Telephone Company (SWB)		
MCI Telecommunications Corporation (MCI)		
Network Equipment Technologies (NET)		
Pacific Bell and Nevada Bell (Pacific)		
US Sprint Communications Company (US Sprint)		
AT&T Reply	Filed	May 15, 1987
Transmittal No. 961	Filed	July 14, 1987
Petitions Opposing	Filed	July 29, 1987
NET		
US Sprint		
AT&T Reply	Filed	August 4, 1987
Memorandum Opinion and Order (summarizing pleadings)	Released	August 19, 1987
Order Designating Issues for Investigation	Released	December 14, 1987
AT&T's Direct Case	Filed	January 28, 1988
Oppositions and Comments	Filed	February 17, 1988
Ad Hoc Telecommunications Users Committee (Ad Hoc)	(late filed March 3, 1988)	
General Services Administration (GSA)		
International Business Machines Corporation (IBM)		
MCI		
US Sprint		
AT&T Rebuttal	Filed	March 3, 1988
Transmittal No. 1340	Filed	September 2, 1988

Virtual Telecommunications Network Service (VTNS), Option 1 (VTNS I) (Dupont Company)

Transmittal No. 1018	Filed	September 22, 1987
Petitions	Filed	October 7, 1987
IDCMA		
MCI		
US Sprint		
Late filed letter (dismissed)		October 19, 1987
Ad Hoc		
AT&T Reply	Filed	October 19, 1987
Transmittal No. 1102	Filed	January 11, 1988
Comments	Filed	January 19, 1988
Timeplex, Inc. (Timeplex)		
Petitions Opposing	Filed	January 26, 1988
IDCMA		
MCI		
US Sprint		
AT&T Reply	Filed	February 2, 1988
Memorandum Opinion and Order (summarizing pleadings; designating issues)	Filed	February 9, 1988
AT&T's Direct Case	Filed	March 25, 1988
Comments and Oppositions	Filed	April 18, 1988
Independent Data Communications Manufacturers Association, Inc. (IDCMA)		
MCI		
US Sprint		
AT&T's Rebuttal	Filed	May 9, 1988

VTNS, Option II (VTNS II) (Ford Motor Company)

Transmittal No. 1145	Filed	February 29, 1988
Petitions opposing	Filed	March 15-16, 1988
IDCMA		
MCI		
US Sprint		
Late filed letters (dismissed)		March 28, 1988
Ford Motor Company (Ford)		
Ad Hoc		
AT&T Reply	Filed	March 28, 1988
Memorandum Opinion and Order (summarizing pleadings)	Released	April 28, 1988
Transmittal No. 1248	Filed	June 7, 1988

VTNS, Option III (VTNS III)

Transmittal No. 1336	Filed	September 1, 1988
Transmittal No. 1349	Filed	September 9, 1988
Petitions opposing	Filed	September 16, 1988
IDCMA		
US Sprint		
MCI		
Puerto Rico Telephone Company (PRTC)		
AT&T Reply	Filed	September 26, 1988
Memorandum Opinion and Order (summarizing pleadings)	Released	October 28, 1988
Transmittal No. 1398	Filed	November 4, 1988

VTNS, Option IV (VTNS IV) (American Airlines)

Transmittal No. 1409	Filed	November 16, 1988
Petitions opposing	Filed	December 1, 1988
IDCMA		
US Sprint		
MCI		
PRTC		
AT&T Reply	Filed	December 8, 1988
Memorandum Opinion and Order (summarizing pleadings)	Released	January 27, 1989

FOOTNOTES

[1] AT&T Communications, Transmittal Nos. 895 and 961, Memorandum Opinion and Order, 2 FCC Rcd 5493 (1987).

[2] AT&T Communications, Transmittal Nos. 895 and 961, CC Docket No. 87-568, Order Designating Issues for Investigation, 2 FCC Rcd 7389 (1987).

[3] *Id.* at 7390.

[4] AT&T Communications, Transmittal Nos. 1018 and 1102, CC Docket No. 87-568, Memorandum Opinion and Order, 3 FCC Rcd 995 (1988).

[5] AT&T Reply, Transmittal No. 1018 at 1-2.

[6] AT&T Communications, Transmittal No. 1145, Memorandum Opinion and Order, 3 FCC Rcd 2837 (1988) (indicating that VTNS II would be included in the CC Docket No. 87-568 investigation).

[7] AT&T Communications, Transmittal Nos. 1336 and 1349, Memorandum Opinion and Order, DA 88-1714, released Oct. 28, 1988 (indicating that VTNS III would be included in the CC Docket No. 87-568 investigation).

[8] AT&T Communications, Transmittal No. 1409, Memorandum Opinion and Order, 4 FCC Rcd 1342 (1989) (indicating that VTNS IV would be included in the CC Docket No. 87-568 investigation).

[9] The chronological history of the record in this investigation, and a listing of parties to this investigation are attached to this Order as an Appendix. The abbreviations indicated in the Appendix for parties and their filings are used throughout this Order.

[10] AT&T Reply, Transmittal No. 1018 at 6-8 & 6 n.**; AT&T Direct Case, Transmittal Nos. 895 and 961 at 4-6, 9-15; AT&T Rebuttal, Transmittal Nos. 895 and 961 at 2-3; AT&T Reply, Transmittal No. 1145 at 4 n.* & n.**.

[11] *E.g.*, Decreased Regulation of Certain Basic Telecommunications Services, CC Docket No. 86-421, Notice of Proposed Rule Making, 2 FCC Rcd 645 (1987); Special Construction of Lines and Special Service Arrangements Provided by Common Carriers, CC Docket No. 84-369, Notice of Proposed Rule Making, 97 FCC 2d 978 (1984). The Commission has not adopted final orders in the proceedings established by these notices of proposed Rule Making. *See also*, *e.g.*, Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Notice of Proposed Rule Making, 2 FCC Rcd 5208 (1987); Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities and Authorizations Therefor, CC Docket No. 79-252, Second Report and Order, 91 FCC 2d 59 (1982);

[12] AT&T also infers from certain Commission orders that individualized services, or services which may be used by only a limited group of customers, are permissible and that it is therefore lawful for it to offer custom designed services for particular customers. National Aeronautics and Space Administration, 61 FCC 2d 56 (1976); COMSAT General, Order, Authorization and Certificate, File No. I-T-C-84-132, released Apr. 5, 1985 at para. 5.

[13] *See, e.g.*, GSA, Comments on Direct Case, Transmittal Nos. 895 and 961 at 4; Letter from J. Blaszak to Hon. D. Patrick, Chairman, FCC, Oct. 20, 1988 (Ad Hoc October 20 letter); Letter from J. Blaszak to Hon. D. Patrick, Chairman, FCC, Dec. 20, 1988 (Ad Hoc December 20 letter); Letter from J. Blaszak to D. Searcy, Secretary, FCC, Mar. 3, 1989 (Ad Hoc March 3 letter); Letter from P. Whittle to D. Searcy, Secretary, FCC, Mar. 10, 1989 (Ad Hoc March 10 letter).

[14] *See* e.g., US Sprint Opposition to Direct Case, Transmittal Nos. 1018 and 1102 at 3-11; IDCMA Opposition to Direct Case, Transmittal Nos. 1018 and 1102 at 5-31; PRTC Petition, Transmittal No. 1409 at 4-7; US Sprint Petition, Transmittal No. 1409 at 4; IDCMA Petition, Transmittal No. 1409 at 5-7.

[15] *See* notes 2 and 4, *supra*.

[16] AT&T Direct Case, Transmittal Nos. 1018 and 1102 at 6-7 (footnote omitted). *See* AT&T Reply, Transmittal No. 1336 at 6.

[17] AT&T Rebuttal, Transmittal Nos. 1018 and 1102 at 10.

[18] AT&T Direct Case, Transmittal Nos. 895 and 961 at 4 (citing Comments filed in CC Docket No. 86-421 by ADAPSO at 24-26; Ad Hoc at 21-22; American Petroleum Institute at 4-8; Boeing Computer Service Company at 4; EPSCS Users Ass'n at 4-5; and GSA at 6).

[19] *See, e.g.*, GSA Comments, Transmittal Nos. 895 and 961; Ad Hoc October 20 letter; Ad Hoc December 20 letter.

[20] GSA Comments, Transmittal Nos. 895 and 961 at 4.

[21] *Id.* at 6.

[22] *See, e.g., id.*, Ad Hoc March 3 letter; Ad Hoc March 10 letter. *See also* Letter from J. Juracek to Hon. D. Patrick, Chairman, FCC, Jan. 11, 1989.

[23] Ad Hoc December 20 letter at 1-2. *See also* Ad Hoc October 20 letter at 1-2.

[24] *See, e.g.*, Ad Hoc October 20 letter; Ad Hoc December 20 letter; Ad Hoc March 3 letter; Ad Hoc March 10 letter.

[25] MCI Comments on Direct Case, Transmittal Nos. 895 and 961 at 2 (footnote omitted).

[26] *Id.* at 2 (footnote omitted) (quoting in part from AT&T Direct Case, Transmittal Nos. 1018 and 1102 at ii).

[27] *See, e.g.*, AT&T Direct Case, Transmittal Nos. 895 and 961 at 2 n.**, 17; AT&T Direct Case, Transmittal Nos. 1018 and 1102 at i-ii, 12-15.

[28] *See, e.g.*, AT&T Direct Case, Transmittal Nos. 1018 and 1102 at 12-13, AT&T Rebuttal, Transmittal Nos. 1018 and 1102 at 11.

[29] AT&T Direct Case, Transmittal Nos. 895 and 961 at Appendix 10; AT&T Direct Case, Transmittal Nos. 1018 and 1102 at 14 n.*.

[30] *See, e.g.*, IDCMA Opposition to Direct Case, Transmittal Nos. 1018 and 1102 at 13-20; US Sprint Opposition to Direct Case, Transmittal Nos. 1018 and 1102 at 5-11; IDCMA Petition, Transmittal Nos. 1336 and 1349 at 11-15; US Sprint Petition, Transmittal Nos. 1336 and 1349 at 1-3; Letter from D. Nall to D. Searcy, Secretary, FCC, dated Mar. 20, 1989 at 2-4.

[31] *See, e.g.*, US Sprint Opposition to Direct Case, Transmittal Nos. 1018 and 1102 at 6 n.5; IDCMA Opposition to Direct Case, Transmittal Nos. 1018 and 1102 at 13-20; IDCMA Petition, Transmittal Nos. 1336 and 1349 at 11-15.

[32] *See, e.g.*, AT&T Direct Case, Transmittal Nos. 895 and 961 at 6, 15-21; AT&T Rebuttal, Transmittal Nos. 895 and 961 at 6-14; AT&T Rebuttal, Transmittal Nos. 1018 and 1102 at 8-12.

[33] *See, e.g.*, US Sprint Opposition to Direct Case, Transmittal Nos. 1018 and 1102 at 3-11; IDCMA Opposition to Direct Case, Transmittal Nos. 1018 and 1102 at i-ii, 11-12, 20-32; IDCMA Petition, Transmittal Nos. 1336 and 1349 at 7-17; PRTC Petition, Transmittal No. 1409 at 4-7; US Sprint Petition, Transmittal No. 1409 at 4; IDCMA Petition, Transmittal No. 1409 at 7-9.

[34] *See* note 66, *infra*.

[35] *See Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 653-54 (1978)(agency may properly provide direction for future filings upon rejection of carrier's tariff; carriers are not required to play "The Price is Right").

[36] Some parties to this proceeding suggest that § 202(a) is irrelevant to our analysis of integrated service packages if the package is provided by carriers classified as non-dominant pursuant to our *Competitive Carrier* proceeding. As our First Report and Order in that docket emphasized, however, "our action . . . [did] not relieve non-dominant carriers from [the requirement of] complying with the provisions of Sections 201-205 of the Act." 85 FCC 2d 1 at 18. Rather, we concluded that our action "merely modifies the method by which the Commission assures compliance with these requirements" (*id.*) since "marketplace forces should be sufficient to insure that the rates of . . . non-dominant carriers are . . . not unjustly discriminatory." *Id.* at 14, n. 36.

[37] *American Broadcasting Companies, Inc. v. FCC*, 663 F.2d 133, 138 (D.C. Cir. 1980).

[38] *ABC v. FCC*, 663 F.2d at 138.

[39] *See* note 25, *supra*.

[40] 663 F.2d at 138-39, *citing American Trucking Associations, Inc. v. FCC*, 377 F.2d 121, 127 (D.C. Cir.1966), *cert. denied*, 386 U.S. 943 (1967).

[41] *Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790, 795 (D.C. Cir. 1982).

[42] 663 F.2d at 139.

[43] 680 F.2d at 796.

[44] 680 F.2d at 790, 796 n.13. *See also* 680 F.2d at 801 (MacKinnon, J. concurring).

[45] 680 F.2d at 796 n. 13.

[46] *American Trucking Associations, Inc. v. FCC*, 377 F.2d 121 (D.C. Cir. 1966).

[47] *Western Union International, Inc. v. FCC*, 568 F.2d 1012 (2d Cir. 1977).

[48] *Id.* at 1018.

[49] 568 F.2d at 1018.

[50] 680 F.2d at 796.

[51] 680 F.2d at 796 ("[W]e state these few guides for sharpened analysis. First, the Commission should not blend discrete services in its application of the test. Second, the perceptions of users of each service under examination should be evaluated. Finally, alleged differences in the services compared should be considered.")

[52] 680 F.2d at 796 n.14.

[53] *See, e.g.*, 680 F.2d at 794 n.4 & 796.

[54] 680 F.2d at 803.

[55] *Id.* at 808 (emphasis in original).

[56] *Ad Hoc Telecommunications Users Comm.*, 680 F.2d at 797.

[57] *See, e.g.*, AT&T Direct Case, Transmittal Nos. 895 and 961 at Appendix 10.

[58] *See, e.g.*, AT&T Direct Case, Transmittal Nos. 1018 and 1102 at Appendix 1, 1.

[59] *See* Comments of Ad Hoc, GSA, *supra*, note 22.

[60] Alchian, "Costs and Outputs", in *The Allocation of Economic Resources: Essays in Honor of Bernard Francis Haley* 23 (M. Abramovitz et al., ed. 1959).

[61] Williamson, *The Economic Institutions of Capitalism* (1985).

[62] *See* note 65, *infra*.

[63] *But see* para. 25, *supra*.

[64] In addition, AT&T has proposed to add to VTNS Option 1 a hub with 68 ports in LATA No. 340. AT&T Transmittal No. 1485, filed Jan. 13, 1989.

[65] This conclusion applies to DTSA as well, since it also contains geographic limitations, although the tariff is ambiguous as to the service provided the customer under the tariff. We note that such ambiguity would itself be a basis for rejection of the tariff. Accordingly, we will require AT&T to apply the requirements of this Order to the DTSA offering as well.

[66] While we find in this Order that AT&T's Tariff 12 revisions are unlawful, we are allowing those tariffs to continue in effect under the exception described in *MCI Telecommunications Corp. v. FCC*, 627 F. 2d 322 (D.C.Cir. 1980). In that decision, the court observed that this Commission could continue unlawful tariffs in effect "for a short period to allow the carrier to quickly develop an interim alternative" (id. at 338) since doing so would "enable the FCC to prevent the complete cessation of vital communication services -- admittedly a valid goal -- because of the carrier's failure to then have an effective tariff on file." *(Id.)* We find this course of action particularly appropriate here since the basis for our rejection of AT&T's tariff is the limitation on availability to other customers rather than objections to the services or rates provided to the existing Tariff 12 customers. Thus, it is possible that AT&T will conform its existing offerings to our requirements without a significant change in service from the present customers' perspective.

[67] Sea-Land Service, Inc. v. I.C.C., 738 F.2d at 1316.

[68] *Id.*

[69] Carriers must also demonstrate, of course, compliance with our existing tariff requirements and policies, including our prohibition against unreasonable restrictions on resale. *See* Resale and Shared Use Decision, 83 FCC 2d 167 (1980).

[70] In finding AT&T's Tariff 12 to be unreasonably discriminatory on the basis of the geographic restrictions, we have not found it necessary to evaluate whether other restrictions in Tariff 12 might also unreasonably discriminate among customers of integrated service packages. It appears to us that the geographic restrictions on their face make it impossible for any other customers to take a Tariff 12 package. While certain other restrictions *(e.g.,* specification of the precise number of ports and data transmission capabilities (dtcs) available with each offering combined with a customer option subsequently to add or delete ports and dtcs; unjustified variations in mileage bands; limitations on the time periods during which customers may order service, begin service, or add hubs) could be subject to abuse, they would not concern us so long as AT&T readily honors requests that vary only insubstantially in specific time or quantity requirements. Thus, in the presence of an affirmative statement that packages are generally available, and in the absence of unreasonably specific limitations like the geographic restrictions noted above or indications that any party with a substantially similar request has been denied service under an integrated package tariff, the inclusion of specific terms is not *per se* unlawful.

[71] We recognize that there may be a relationship between complaints by customers and complaints by a carrier's competitors. While we do not, and, of course, could not, foreclose complaints by the latter, the party most likely to raise the discrimination issues that concern us in this Order, and best positioned to frame them appropriately, is the customer.

STATEMENT OF COMMISSIONER JAMES H. QUELLO

April 12, 1989

In re: AT&T Communications--Revisions to Tariff F.C.C. No. 12

It is my understanding that the Commission is unanimous in the view that AT&T's integrated service offerings under the general heading Tariff No. 12 are unlike any other AT&T offerings with respect to Section 202(a) of the Communications Act. It is also my understanding that we are unanimous in the view that the Tariff 12 offerings currently on file must be rejected as unlawful.

Where there are differences among us, they appear to focus upon events which have not yet transpired. Would it be desirable to be in a position to make a definitive finding on the current state of competition in the interexchange industry? Absolutely! Unfortunately, in this limited tariff review proceeding we have no adequate record to make such a finding. Should we develop such a record? Without a doubt. I have long urged my colleagues to launch an appropriate proceeding to examine the state of competition in the interexchange industry, as a whole, as well as the competitive situation in various sub-markets. Today, we have indicated that such a review will proceed forthwith.

The relevant issues decided today were appropriate in the relatively narrow context of reviewing a tariff filing. While from a policy perspective we could benefit from a careful review of the markets, there is no legal necessity to rely upon the state of competition in deciding these issues. I am convinced that they were decided correctly and that sufficient guidance was provided to permit the carrier to refile should it so choose. That, it seems to me, is the extent of our responsibility in the present context.

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: AT&T Communications Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568

I concur that Tariff 12 is unlawful as presently structured. I disassociate myself from the Order's analysis of how and why it should be restructured. The Order's principal fault is not in what it says, but in what it does not say. It ignores many of the hard questions and provides little more than vague and incomplete "guidance" about the revisions to Tariff 12 which might pass regulatory muster.

In numerous and substantial ways, Tariff 12 violates the Commission's existing rules and policies, particularly the Commission's rate structure guidelines and policies against restrictions on shared use and resale. The Order, however, addresses Tariff 12 primarily in terms of a narrow "like services" analysis under Section 202(a) of the Act. By failing to address rate structure, shared use and resale issues, the Order pushes off to an unspecified future date the real decisions to which AT&T, its competitors, and the public are entitled today.

I agree with the Order to the extent it finds the overall Tariff 12 arrangements are not "like" AT&T's unbundled general tariff offerings, but do not adopt its reasoning. The Order invokes "modern economic analysis", see Paras. 50-52. It also relies on the carrier's ability to "change the facility and service mix used to deliver an integrated package service completely unbeknownst to the customer", *id.* at para. 45, as one sign of "unlikeness". Neither reason is relevant or persuasive.

Judicial precedent, such as *Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790, 797 (D.C. Cir. 1982), establishes that determinations of "likeness" turn on practical considerations and on the customer's perceptions. The business arrangements between AT&T and its Tariff 12 customers appear to extend far beyond the bare tariffs now before the Commission.[1] Thus, common sense suggests that the larger Tariff 12 arrangements are not "like" AT&T's general tariff offerings even if the bare tariffs, standing alone, might very well be "like" other tariffed services.[2] The contracts between AT&T and its Tariff 12 customers in some cases appear to encompass unregulated equipment and services in addition to regulated transmission. The value AT&T adds distinguishes the negotiated contracts which subsume the Tariff 12 packages from AT&T's general offerings . These arrangements are directly competitive with those designed and offered by systems integrators such as Electronic Data Systems and Martin Marietta, which assemble private networks for customers. Customers must be paying AT&T and these systems integrators for something different when they put together these "turn-key" operations. Economic theory is not needed to understand this practical reality of a distinct market segment.[3]

Nor does the Order's reliance on the carrier's ability to change facility and service mixes unbeknownst to the customer make sense as a basis for finding "unlikeness" under the applicable test of customer perception . If the customer does not even know the carrier is changing its facilities and service mix, how can it perceive "unlikeness"? AT&T may perceive a difference, but it is the customer's perception which is the "linchpin" of the likeness analysis. *Ad Hoc Telecommunications Users Committee v. FCC, supra* 680 F.2d at 796.

In addition to its overly narrow view of the issues, the Order inexplicably ignores Commission precedents which strongly suggest that even a refiled Tariff 12 would be unlawful. AT&T may be willing to negotiate with interested parties such as resellers, who seek particular functions at the Tariff 12 prices . If AT&T is not willing, however, these parties will raise in complaint proceedings the same issues which the Order leaves unresolved.[4] These issues have been pending for almost two years and are overripe for decision now. I discuss some of them below.

First, Section 61.40 of the Commission's Rules requires AT&T to use consistent pricing and rate structures among its private line services unless it can justify departing from these guidelines. A large component of Tariff 12 offerings consists of private line functions currently available in other AT&T tariffs. The purpose of these guidelines is, in part, to prevent "the same functional capabilities [from being] provided under different tariffs at different rates based on the way the services are named and packaged," *Private Line Rate Structure*, 97 FCC 2d 923, 929 (1984). Such a repackaging would, according to the Commission,

violate the private line guidelines, because it would give the carrier the ability "to discriminate among customers and cause customer confusion." *Id.*

The policies embodied in *Private Line Rate Structure* are plainly relevant here. These policies are incorporated into guidelines which favor building block tariffs with consistent guidelines which favor building block tariffs with consistent rate structures, terms and conditions. From a purely practical point of view, the development of individual rates for specific customers, whose availability is limited by imposing restrictions uniquely applicable to that customer, present problems of potential abuse which are not amenable to individual case-by-case review. The determination of whether the customer for a particular Tarifff 12 offering receives unreasonably preferential or prejudicial treatment turns upon unique, and in some cases, indeterminable factors in each instance, such as the extent to which AT&T bargained in good faith with a particular customer or the reasonableness of profit margin variance across customers. It was in substantial part to avoid this sort of near-impossible task that the guidelines were developed.

When a carrier claims that integration of services into a package or the commitment of the customer to minimum time periods or volumes generate efficiencies reflected in rate reductions, the starting point for evaluating the reduced rates should be the rates, terms and conditions in the tariffs applied to other customers. Tariffs are the basic mechanism for assuring consistent treatment for customers at reasonable rates. Where a package of services includes services otherwise available under tariff, the package rate should, as a rule, be comparable to the rates applied to customers who take the service separately, as well as to customers who also take other services as part of a package.

This does not imply that efficiencies may not be recognized. Rather, the proper standard is that those efficiencies should be recognized in as general and consistent a manner as possible. AT&T argues that service characteristics such as commitments for minimum periods or volumes makes it possible to plan its network more efficiently and thereby generate cost savings that it can reflect in lower rates to the customer. But this argument proves too much. It is applicable to services generally. AT&T makes no significant showing that discriminatory limitation of the Tariff 12 offerings to individual customers is necessary to achieve these efficiencies, or even more importantly, that similar efficiencies would not be achieved by offering such options to customers generally.

In today's marketplace, strict application of these guidelines to the Tariff 12 offerings might be inappropriate,[5] but ignoring our rules rather than explaining why they might no longer serve the public interest simply increases the likelihood of reversal on judicial review. Rather than addressing how the Tariff 12 packages can be squared with the guidelines, the Order does not even acknowledge they exist.[6]

Second, although the Order undertakes an extensive analysis before finding that integrated service packages are not "like" their tariffed component service counterparts for purposes of Section 202(a) of the Act, this should not end the inquiry.[7] One component of the integrated service packages available under Tariff 12 is discounted transmission service that is unavailable to anyone besides Tariff 12 customers. Although AT&T maintains that Tariff 12 is available to anyone,[8] and the Order requires AT&T to remove a few of the pricing parameters that make Tariff 12 customer-specific, both points miss the target. As one of the commenters points out, "IDCMA is not necessarily contesting the lawfulness of such discounted prices, but rather the effective unavailability of such prices to other customers, *e.g.* as part of a private network approach not bundled by AT&T, but designed by an independent manufacturer using AT&T regulated transmission services."[9]

The reasonableness of the limited availability of these apparently discounted prices under Section 201 (b) of the Act is a key issue which the Order ignores. This failure is troubling because of longstanding Commission precedent finding similar conduct by AT&T to be unreasonable. *See, e.g., AT&T-Restrictions on Interconnection of Private Line Services,* 60 FCC 2d 939 (1976) (AT&T tariff provisions effectively limiting "piece-out" of a customer's communications network to use non-AT&T communications services or equipment found unlawful); *AT&T Company,* 71 FCC 2d 1 (1979) (AT&T refusal to interconnect with customer-provided private microwave system found unreasonable).

Finally, although the Tariff 12 offerings do not contain explicit or direct restrictions on resale, some features of these offering (such as the various rate structures, term requirements, and customer location restrictions) appear likely to have the effect of pegging rate preferences to specific customers. This makes it very unlikely that any other customer, reseller, or member of the public could use the offering. Our prohibition against resale restrictions applies to indirect restrictions achieved via unreasonable tariff structures and conditions, *Resale and Shared Use,* 83 FCC 2d 167, 168 (1980), *Private Line Rate Structure,* 97 FCC 2d at 947. The Order does not demonstrate how AT&T's current Tariff 12 offerings comply with the Commission's policies favoring unlimited resale and shared use.[10]

By straining to give tacit approval to Tariff 12-type arrangements, the Commission tempts fate. If a court challenge proves successful, AT&T could be left without any Commission-sanctioned tariff flexibility for major accounts. The Commission would then likely be forced to undertake a lengthy proceeding to grapple belatedly with the core issues, an undertaking which could prove too little too late.[11]

FOOTNOTES FOR STATEMENT

[1] Because the Commission never asked for or received the underlying contracts, the record is devoid of any hard evidence of the exact relationship between AT&T and its Tariff 12 customers. *See* further discussion in fn. 7, *infra.*

[2] No party to these proceedings identifies or demonstrates any functionality or service available in Tariff 12 offerings, standing alone, which is different from any service or functionality otherwise available under existing tariffs. They are not different as are AT&T's "special construction" offerings, which have historically been tariffed on an individual case basis.

[3] If the Order means to exclude from the Tariff 12 offerings the consideration of any unregulated equipment and services which AT&T apparently includes as an inextricable part, then I could not agree that the bare Tariff 12 services are unlike AT&T's other tariffed services. In any event, regardless of whether the Tariff 12 offerings are "like" or "unlike", they must nonetheless comply with the Commission's Private Line

Rate whether the Tariff 12 offerings are "like" or "unlike", they must nonetheless comply with the Commission's Private Line Rate Structure guidelines and resale policies discussed below.

[4] Arguments over whether a new customer's request for a Tariff 12 package is "substantially similar" to an existing Tariff 12 package, *see* Order at 21-22, fn. 70, or whether a requested modification is "unreasonable", *see* Order at 22, para. 65, come immediately to mind. The Order also begs the important question of whether systems integrators are customers or competitors of AT&T. Systems integrators are customers because they use regulated transmission services. Yet, they also compete with Tariff 12-type offerings by assembling private networks using regulated transmission services and independently manufactured equipment. Does this mean that systems integrators are *"bona fide"* customers for Tariff 12 service whose rights the Commission will "very strictly enforce", Order at para. 66, or are they competitors, whose complaints the Commission would apparently disfavor? *See* Order at 22, fn. 71. Not only does the Order fail to clarify the distinction it draws between customer and competitor complaints, it also cites no authority for doing so. I find no support in Title II of the Act for any such distinction.

[5] *See* Rebuttal Case of AT&T at 15, n. ***. *See also* discussion of the need to reexamine the state of competition in the interexchange market today at fn. 11, *infra*.

[6] The Order also fails to acknowledge the private line rate structure guidelines when it cites *Sea-Land v. ICC*, 738 F.2d 1311 (D.C.Cir. 1984). The case provides no support for the assertion that rates set by negotiation between carrier and customer are not per se unlawful and that the complaint mechanism is appropriate under the particular circumstances we face. In *Sea-Land*, the Interstate Commerce Commission had adopted an explicit policy statement approving the concept of contract rates. Unlike the ICC, however, this Commission has never completed proceedings in CC Docket 86-421, where it asked whether decreased regulation was appropriate in the case of telecommunications services and systems awarded pursuant to competitive bidding. On the contrary, the private line rate structure pricing guidelines are aimed at controlling the potential discrimination that could result from the pricing freedom inherent in contract ratemaking.

[7] The Order's failure to investigate what appear to be underlying contracts between AT&T and its Tariff 12 customers undercuts the validity of its finding that Tariff 12 services are not "like" AT&T's generally available tariffed services, *compare MCI v. FCC*, No. 86-1181, D.C. Cir., decided March 29, 1988. Failure to investigate the underlying contracts is especially troubling given allegations that AT&T may be "advancing the competitiveness of its equipment and other nonregulated offerings through discounts of its regulated network services." IDCMA Petition to Reject, September 16, 1988 at n. 1. Because the Tariff 12 services appear to be available only to those who enter into contracts with AT&T, the contracts are an inextricable part of the Tariff 12 offering. I would have required AT&T to produce their Tariff 12 customer contracts. I would not, however, have made these contracts routinely available for public inspection.

[8] *See* Rebuttal Case of AT&T at 8.

[9] IDCMA Petition to Suspend and Investigate, January 26, 1988 at n.16.

[10] Footnote 69 correctly acknowledges that carriers may not restrict resale and shared use, but the Order never puts Tariff 12 to this test. In fact, the Order implies that the Commission itself would condone discrimination against resellers and other carriers. See para. 66 of the Order, which states that the rights of *bona fide* customers will protected, while fn. 71 suggests that complaints by a reseller would not be welcomed. *See* also fn. 2.

[11] I have previously called upon the Commission to re-examine the state of competition in the interexchange market *(see* Separate Statement of Commissioner Patricia Diaz Dennis in Filing an Review of AT&T's Open Network Architecture Plan, FCC 88-382, release December 22, 1988) as a predicate to our analysis of all dominant carrier regulation. I am pleased that the Commission will be starting a new proceeding to investigate the state of competition in the interexchange market and the regulatory policies that should be adopted given today's market realities. If we had undertaken such a proceeding earlier, we would be in a better position to decide the core policy issue which Tariff 12 presents: what pricing flexibility should AT&T have?